ONTARIO
LABOUR RELATIONS BOARD
REPORTS

September/October 2011

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A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Cited [2011] OLRB REP. SEPTEMBER/OCTOBER

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

CASES REPORTED

		PAGE
1.	EPSCA; Bruce Power LP; Aecon Industrial, A Division of Aecon Construction Group Inc.; Black & Mcdonald Limited; Comstock Canada Ltd.; E.S. Fox Limited; Re IBEW Electrical Power Council of Ontario; Re Canadian Union of Skilled Workers	517
2.	European Quality Meats and Sausages; Re United Food and Commercial Workers International Union, Local 175	523
3.	Hydro One Inc.; Re LIUNA, Ontario Provincial District Council and LIUNA Local 1059	534
4.	Investia Financial Services Inc. and Industrial Alliance Insurance and Financial Services Inc., Re Shlomo Conforti	549
5.	Islington Nurseries Limited; Re Universal Workers Union, LIUNA, Local 183 (September 23, 2011)	561
6.	Islington Nurseries Limited; Re Universal Workers Union, LIUNA, Local 183 (October 17, 2011)	549
7.	Meridian Lightweight Technologies Inc.; Re Mike Radan and Director of Employment Standards	587
8.	Metrolinx; Re Amalgamated Transit Union, Local 1587	601
9.	United Brotherhood of Carpenters and Joiners of America; Re United Brotherhood of Carpenters and Joiners of America, Local Union 1256	613
10.	Workers United Canada Council; Re Workers United and Canadian Office & Professional Employees Union, Local 343	619

COURT PROCEEDINGS

1.	Greater Essex County District School Board; Re United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local 552, and The Ontario Labour Relations Board	629
2.	Pharma Plus Drugmarts Ltd. et al; Re CAW-Canada	652
3.	Vale Inco Limited; Re United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Locals 6500 and 6200 and The OLRB	669

SUBJECT INDEX

Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Reconsideration – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 613

Certification – Construction Industry – Evidence – Practice and Procedure – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice – The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all

related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 561

Certification – Construction Industry – Reasonable Apprehension of Bias – Unfair Labour Practice – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 582

Construction Industry – Alteration of Jurisdiction – Practice and Procedure – Reconsideration – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

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ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 582

Construction Industry Grievance – Evidence – Reconsideration – During opening statements, the Applicant gave notice for the first time that it intended to call evidence of past practice and collective bargaining negotiations to support its interpretation of a premium pay provision in the collective agreement, and to support an estoppel argument – The Board ruled that the applicant could not call such evidence – On reconsideration, the Board reiterated its reasons for disallowing the evidence – The Board distinguished itself from privately constituted, and funded, boards of arbitration whose mandate is to interpret grievances liberally to deal with them on their merits – The Board is a public administrative tribunal with limited resources, established forms, processes and Rules of Procedure – The Board held that the applicant failed to raise the material facts on which it sought to rely in its grievance referral, effectively ambushing the responding parties on the first day of hearing – As the responding parties in this proceeding did not sit at the bargaining table, they were in no position to be able to respond to allegations surrounding negotiations – Further, the passage of time (from the referral to the first day of hearing, and from opening statements to when the evidence might be heard) could seriously prejudice the responding parties – Reconsideration denied

EPSCA; BRUCE POWER LP; AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; BLACK & MCDONALD LIMITED; COMSTOCK CANADA LTD.; E.S. FOX LIMITED; RE IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE CANADIAN UNION OF SKILLED WORKERS 517

Construction Industry Grievance – Judicial Review – Timeliness – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a referral to arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5 months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the

grievance to arbitration – The Board found that although the grievance was clearly untimely in terms of the collective agreement, the matter was arbitrable because the arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, AND THE ONTARIO LABOUR RELATIONS BOARD 629

Construction Industry Grievance – The union grieved after the employer ordered six employees not to report for work on a day the employer scheduled a foremen meeting – The union asserted the employees were suspended without cause rather than laid-off because a lay-off required there to be a shortage of work – In the alternative, if there was a lay-off, the union argued the employer breached the lay-off provisions of the collective agreement because employees with less seniority than the grievors were permitted to report to work on the relevant day – In response, the employer relied on the standoff provisions of the collective agreement which allowed it to standoff part or all of a crew if the crew was unable to proceed with work – The employer asserted the grievors were unable to work because there were no foremen available to supervise them – The Board held the employer acted properly within its rights under the standoff provisions of the agreement – The Board reasoned a standoff is a type of short duration lay-off but the parties clearly differentiated between the two in the collective agreement – Specifically, the collective agreement did not stipulate a standoff could only occur due to a shortage of work or

provide seniority-based bumping rights in such circumstances – The Board further reasoned the employer made a *bona fide* operational decision and was not obligated under the agreement to pursue or implement alternative scheduling options such as overstaffing other crews or hiring additional foremen – Grievance dismissed

HYDRO ONE INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA LOCAL 1059 534

Crown Employees Collective Bargaining Act – Duty to Bargain in Good Faith – Essential Services – The parties disagreed about whether a valid essential services agreement (ESA) within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made

METROLINX; RE AMALGAMATED TRANSIT UNION, LOCAL 1587 601

Discharge – Employment Standards – The employer applied for review of an Employment Standards Officer's determination that it owed termination pay in lieu of notice – The company policy in place provided for the retention of an employee's seniority and recall rights for eighteen months in the event of layoff – The employee received a letter described as a "required written notice of termination/indefinite layoff" – Nine months later, the employer sent the employee another letter asking the employee to choose whether he would receive his severance pay or defer receiving the payment and maintain his seniority and recall rights – The employee chose to receive his severance pay at that time – This claim was filed two months later – The employer submitted that the initial letter constituted notice of termination and thus no termination or vacation pay was owed – It argued that based on the plain language of the Act, where an employer lays an employee off without specifying a recall date, the layoff is considered to be a termination when it exceeds a "temporary layoff" – The Board found that the employee was terminated pursuant to section 56(1)(c) of the Act, when his layoff lasted longer than the period defined by the Act as a temporary layoff – Furthermore, s. 56(5) of the Act deemed the termination to have occurred on the first day of the lay-off – The Board found that the initial letter given to the employee stated that it was a written notice of termination pursuant to the Act – The Board did not read the Act as precluding non-union

employers from "setting off" the notice period in the same circumstances as their unionized counterparts where they give notice of termination prior to a layoff without a recall date or "indefinitely" – The Board found that the initial letter constituted the requisite notice of termination and that the employer did not owe any termination pay – Application granted

MERIDIAN LIGHTWEIGHT TECHNOLOGIES INC.; RE MIKE RADAN AND DIRECTOR OF EMPLOYMENT STANDARDS 587

Discharge – Health and Safety – Practice and Procedure – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI 549

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union activities – One employee had been chronically late, was not able to use the employer's time clock system properly, did not effectively supervise his workers, and had made a serious error in a customer's order – The other employee had a habit of being unable to follow her work schedule and had been involved in a physical dispute with a customer – The Board noted that despite the possible misconduct of the terminated employees, there appeared to be a causal relationship between the employees' involvement in the union's organizing campaign and their discharge – The Board considered that there had been no serious discipline for the alleged misconduct until the organizing drive – The two employees that had been terminated had signed up 24 of 32 new union members – The Board found that the union may suffer irreparable harm in

terms of its organizing campaign and in obtaining a vote that is reflective of the true wishes of the employees if interim relief of reinstatement was not granted – The balance of harm favoured granting the order – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint and ordered the employer to post a copy of the decision and a Notice to Employees about the decision in the workplace

EUROPEAN QUALITY MEATS AND SAUSAGES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175 523

Duty to Bargain in Good Faith – *Crown Employees Collective Bargaining Act* – Essential Services – The parties disagreed about whether a valid essential services agreement (ESA) within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made

METROLINX; RE AMALGAMATED TRANSIT UNION, LOCAL 1587 601

Employer – Reference – The Minister referred two questions to the Board: (1) does the Minister need to know the correct name of the employer to appoint an arbitrator under section 49 of the Act when the union seeking to have the Minister appoint an arbitrator named an employer who objected to the appointment on the grounds it was not the employer party to the collective agreement under which the grievance was filed? And (2) if so, did the union in this case name the employer who was the party to the collective agreement? The Board determined the Minister needed to know the identity of the employer party to the collective agreement under which the grievance was filed – On the facts of this case, the Board held that the union had not named the right employer in its request to the Minister – The Board explicitly rejected the argument that the employer's identity is an issue of arbitrability that ought to be dealt with by the arbitrator

WORKERS UNITED CANADA COUNCIL; RE WORKERS UNITED AND CANADIAN OFFICE & PROFESSIONAL EMPLOYEES UNION, LOCAL 343 619

Employment Standards – Discharge – The employer applied for review of an Employment Standards Officer's determination that it owed termination pay in lieu of notice – The

company policy in place provided for the retention of an employee's seniority and recall rights for eighteen months in the event of layoff – The employee received a letter described as a "required written notice of termination/indefinite layoff" – Nine months later, the employer sent the employee another letter asking the employee to choose whether he would receive his severance pay or defer receiving the payment and maintain his seniority and recall rights – The employee chose to receive his severance pay at that time – This claim was filed two months later – The employer submitted that the initial letter constituted notice of termination and thus no termination or vacation pay was owed – It argued that based on the plain language of the Act, where an employer lays an employee off without specifying a recall date, the layoff is considered to be a termination when it exceeds a "temporary layoff" – The Board found that the employee was terminated pursuant to section 56(1)(c) of the Act, when his layoff lasted longer than the period defined by the Act as a temporary layoff – Furthermore, s. 56(5) of the Act deemed the termination to have occurred on the first day of the lay-off – The Board found that the initial letter given to the employee stated that it was a written notice of termination pursuant to the Act – The Board did not read the Act as precluding non-union employers from "setting off" the notice period in the same circumstances as their unionized counterparts where they give notice of termination prior to a layoff without a recall date or "indefinitely" – The Board found that the initial letter constituted the requisite notice of termination and that the employer did not owe any termination pay – Application granted

MERIDIAN LIGHTWEIGHT TECHNOLOGIES INC.; RE MIKE RADAN AND DIRECTOR OF EMPLOYMENT STANDARDS 587

Essential Services – *Crown Employees Collective Bargaining Act* – Duty to Bargain in Good Faith – The parties disagreed about whether a valid essential services agreement (ESA) within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made

METROLINX; RE AMALGAMATED TRANSIT UNION, LOCAL 1587 601

Evidence – Certification – Construction Industry – Practice and Procedure – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice – The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 561

Evidence – Construction Industry Grievance – Reconsideration – During opening statements, the Applicant gave notice for the first time that it intended to call evidence of past practice and collective bargaining negotiations to support its interpretation of a premium pay provision in the collective agreement, and to support an estoppel argument – The Board ruled that the applicant could not call such evidence – On reconsideration, the Board reiterated its reasons for disallowing the evidence – The Board distinguished itself from privately constituted, and funded, boards of arbitration whose mandate is to interpret grievances liberally to deal with them on their merits – The Board is a public administrative tribunal with limited resources, established forms, processes and Rules of Procedure – The Board held that the applicant failed to raise the material facts on which it sought to rely in its grievance referral, effectively ambushing the responding parties on

the first day of hearing – As the responding parties in this proceeding did not sit at the bargaining table, they were in no position to be able to respond to allegations surrounding negotiations – Further, the passage of time (from the referral to the first day of hearing, and from opening statements to when the evidence might be heard) could seriously prejudice the responding parties – Reconsideration denied

EPSCA; BRUCE POWER LP; AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; BLACK & MCDONALD LIMITED; COMSTOCK CANADA LTD.; E.S. FOX LIMITED; RE IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE CANADIAN UNION OF SKILLED WORKERS 517

Health and Safety – Discharge – Practice and Procedure – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI 549

Interim Relief – Discharge for Union Activity – Unfair Labour Practice – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union activities – One employee had been chronically late, was not able to use the employer's time clock system properly, did not effectively supervise his workers, and had made a serious error in a customer's order – The other employee had a habit of being unable to follow her work schedule and had been involved in a physical dispute with a customer – The Board noted that despite the possible misconduct of the terminated employees, there appeared to be a causal relationship between the employees' involvement in the union's organizing campaign and their discharge – The Board considered that there had been no serious discipline for the alleged misconduct until the

organizing drive – The two employees that had been terminated had signed up 24 of 32 new union members – The Board found that the union may suffer irreparable harm in terms of its organizing campaign and in obtaining a vote that is reflective of the true wishes of the employees if interim relief of reinstatement was not granted – The balance of harm favoured granting the order – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint and ordered the employer to post a copy of the decision and a Notice to Employees about the decision in the workplace

EUROPEAN QUALITY MEATS AND SAUSAGES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175..... 523

Intervenor – Judicial Review – Natural Justice – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA..... 652

Judicial Review – Construction Industry Grievance – Timeliness – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a referral to arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5

months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the grievance to arbitration – The Board found that although the grievance was clearly untimely in terms of the collective agreement, the matter was arbitrable because the arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, AND THE ONTARIO LABOUR RELATIONS BOARD 629

Judicial Review – Intervenor – Natural Justice – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement

and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA 652

Judicial Review – Procedural Fairness – Vale asked the court to quash the Board's ongoing proceeding as, after hearing some evidence adduced through oral examination and cross examination, the Board directed the parties to file will say statements, and allowed them to expand on the will say statements with a further thirty minutes of examination in chief with cross examination – On the record the court was unable to conclude that the measures adopted by the Board would result in the prospect of a real unfairness – Application dismissed

VALE INCO LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 6500 AND 6200 AND THE OLRB 669

Natural Justice – Judicial Review – Intervenor – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded

them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA 652

Practice and Procedure – Alteration of Jurisdiction – Construction Industry – Reconsideration – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 613

Practice and Procedure – Certification – Construction Industry – Evidence – Witness –In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the

impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice – The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 561

Practice and Procedure – Discharge – Health and Safety – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this

case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI 549

Procedural Fairness – Judicial Review – Vale asked the court to quash the Board's ongoing proceeding as, after hearing some evidence adduced through oral examination and cross examination, the Board directed the parties to file will say statements, and allowed them to expand on the will say statements with a further thirty minutes of examination in chief with cross examination – On the record the court was unable to conclude that the measures adopted by the Board would result in the prospect of a real unfairness – Application dismissed

VALE INCO LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 6500 AND 6200 AND THE OLRB 669

Reasonable Apprehension of Bias – Certification – Construction Industry – Unfair Labour Practice – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 582

Reconsideration – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same

panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 613

Reconsideration – Construction Industry Grievance – Evidence – During opening statements, the Applicant gave notice for the first time that it intended to call evidence of past practice and collective bargaining negotiations to support its interpretation of a premium pay provision in the collective agreement, and to support an estoppel argument – The Board ruled that the applicant could not call such evidence – On reconsideration, the Board reiterated its reasons for disallowing the evidence – The Board distinguished itself from privately constituted, and funded, boards of arbitration whose mandate is to interpret grievances liberally to deal with them on their merits – The Board is a public administrative tribunal with limited resources, established forms, processes and Rules of Procedure – The Board held that the applicant failed to raise the material facts on which it sought to rely in its grievance referral, effectively ambushing the responding parties on the first day of hearing – As the responding parties in this proceeding did not sit at the bargaining table, they were in no position to be able to respond to allegations surrounding negotiations – Further, the passage of time (from the referral to the first day of hearing, and from opening statements to when the evidence might be heard) could seriously prejudice the responding parties – Reconsideration denied

EPSCA; BRUCE POWER LP; AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; BLACK & MCDONALD LIMITED; COMSTOCK CANADA LTD.; E.S. FOX LIMITED; RE IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE CANADIAN UNION OF SKILLED WORKERS 517

Reconsideration – Discharge – Health and Safety – Practice and Procedure – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a

harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI 549

Reference – Employer – The Minister referred two questions to the Board: (1) does the Minister need to know the correct name of the employer to appoint an arbitrator under section 49 of the Act when the union seeking to have the Minister appoint an arbitrator named an employer who objected to the appointment on the grounds it was not the employer party to the collective agreement under which the grievance was filed? And (2) if so, did the union in this case name the employer who was the party to the collective agreement? The Board determined the Minister needed to know the identity of the employer party to the collective agreement under which the grievance was filed – On the facts of this case, the Board held that the union had not named the right employer in its request to the Minister – The Board explicitly rejected the argument that the employer's identity is an issue of arbitrability that ought to be dealt with by the arbitrator

WORKERS UNITED CANADA COUNCIL; RE WORKERS UNITED AND CANADIAN OFFICE & PROFESSIONAL EMPLOYEES UNION, LOCAL 343 619

Related Employer – Judicial Review – Intervenor – Natural Justice – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's

decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA 652

Reprisal – Discharge – Health and Safety – Practice and Procedure – Reconsideration – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI 549

Timeliness – Construction Industry Grievance – Judicial Review – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a referral to arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5 months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the grievance to arbitration – The Board found that although the grievance was clearly

untimely in terms of the collective agreement, the matter was arbitrable because the arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, AND THE ONTARIO LABOUR RELATIONS BOARD 629

Unfair Labour Practice – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Reconsideration – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 613

Unfair Labour Practice – Certification – Construction Industry – Reasonable Apprehension of Bias – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 582

Unfair Labour Practice – Discharge for Union Activity – Interim Relief – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union activities – One employee had been chronically late, was not able to use the employer's time clock system properly, did not effectively supervise his workers, and had made a serious error in a customer's order – The other employee had a habit of being unable to follow her work schedule and had been involved in a physical dispute with a customer – The Board noted that despite the possible misconduct of the terminated employees, there appeared to be a causal relationship between the employees' involvement in the union's organizing campaign and their discharge – The Board considered that there had been no serious discipline for the alleged misconduct until the organizing drive – The two employees that had been terminated had signed up 24 of 32 new union members – The Board found that the union may suffer irreparable harm in terms of its organizing campaign and in obtaining a vote that is reflective of the true wishes of the employees if interim relief of reinstatement was not granted – The balance of harm favoured granting the order – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint and ordered the employer to post a copy of the decision and a Notice to Employees about the decision in the workplace

EUROPEAN QUALITY MEATS AND SAUSAGES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175 523

Witness – Certification – Construction Industry – Evidence – Practice and Procedure – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice – The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 561

2878-10-G IBEW Electrical Power Council of Ontario on behalf of its Affiliate International Brotherhood of Electrical Workers, Local 804, Applicant v. **Electrical Power Systems Construction Association ("EPSCA"); Bruce Power LP; Aecon Industrial, a Division of Aecon Construction Group Inc.; Black & McDonald Limited; Comstock Canada Ltd.; E.S. Fox Limited**, Responding Parties v. Canadian Union of Skilled Workers, Intervenor

Construction Industry Grievance – Evidence – Reconsideration – During opening statements, the Applicant gave notice for the first time that it intended to call evidence of past practice and collective bargaining negotiations to support its interpretation of a premium pay provision in the collective agreement, and to support an estoppel argument – The Board ruled that the applicant could not call such evidence – On reconsideration, the Board reiterated its reasons for disallowing the evidence – The Board distinguished itself from privately constituted, and funded, boards of arbitration whose mandate is to interpret grievances liberally to deal with them on their merits – The Board is a public administrative tribunal with limited resources, established forms, processes and Rules of Procedure – The Board held that the applicant failed to raise the material facts on which it sought to rely in its grievance referral, effectively ambushing the responding parties on the first day of hearing – As the responding parties in this proceeding did not sit at the bargaining table, they were in no position to be able to respond to allegations surrounding negotiations – Further, the passage of time (from the referral to the first day of hearing, and from opening statements to when the evidence might be heard) could seriously prejudice the responding parties – Reconsideration denied

BEFORE: *Diane L. Gee*, Alternate Chair, and Board Members *J. W. Schel* and *R. Baxter*.

DECISION OF THE BOARD; September 28, 2011

1. On June 9, 2011, at the first day of hearing in respect of this matter, counsel for the applicant gave notice, for the very first time, during his opening statement, that the applicant intended to call evidence of past practice and collective bargaining negotiations in support of the applicant's interpretation of the collective agreement language in issue and in further support of an estoppel argument. Counsel for the applicant orally provided particulars of the collective bargaining evidence he intended to call; however, no particulars were provided as to the past practice evidence the applicant intended to call. Following an objection by the responding parties, the Board heard full submissions from all of the parties as to whether the applicant ought to be permitted to call the evidence of past practice and collective bargaining negotiations. After having heard such submissions, the Board ruled orally that the applicant would not be permitted to call evidence of past practice or collective bargaining negotiations.

2. The applicant has filed a request for reconsideration of the Board's oral ruling. The responding parties have been provided with an opportunity to file submissions in response. The applicant has filed Reply submissions. For the reasons that follow, the request for reconsideration is denied.

3. This matter started with a number of grievances that were initiated by the applicant against the responding parties on or about November 24 and 29, 2010. The grievances provide:

> Electricians are not being compensated for radiation work while wearing PAPR's as per the collective agreement.

4. Under the heading "Articles of EPSCA Collective Agreement Allegedly Violated" the grievances state:

> Section 1700 Sub-section E

5. Section 1700E of the EPSCA/IBEW EPCO Collective Agreement provides as follows:

> SECTION 17 RADIATION WORK
>
> ...
>
> E. Employees working in a radiation area, in plastic suits or replacement material of the fully enveloping type with an independent air supply, will receive $12.00 per day. A day for the purpose of this item shall be defined as any period up to twelve (12) hours.

6. On December 1, 2010, the applicant referred this matter to the Board by filing a Referral of Grievance to Arbitration (Construction Industry) Form A-86 (the "grievance referral"). At paragraph 7 of the grievance referral, the applicant is instructed to set out the material facts on which it relies in support of its application. The form states:

> Include all of the material facts on which you rely including the circumstances, what happened, where and when it happened, and the names of any persons said to have acted improperly.

7. The applicant set out the following facts:

a. Certain work at the Bruce Nuclear Power Development ("BNPD"), Bruce "A" Generating Station Units 1 and 2 Restart Project requires tradesmen to work in a radiation area, the reactor vault.

b. The EPSCA/IBEW EPCO Collective Agreement in section 17 Radiation Work Clause 1700E reads as follows:

> E. Employees working in a radiation area, in plastic suits or replacement material of the fully enveloping type with an independent air supply, will receive $12.00 per day. A day for the purpose of this item shall be defined as any period up to twelve (12) hours.

c. Bruce Power LP has directed its subcontractors Aecon Industrial Division of Aecon Group Inc., Black & McDonald Ltd., Bruce Power LP, Comstock Canada Ltd. and E.S. Fox Ltd. to require their tradesmen working in the reactor vault to wear a new type of fully enveloping suit with an independent air supply known as a PAPR.

d. The Union is informed that the PAPR independent breathing device draws contaminated ambient air from the reactor vault through a filter device and supplies the filtered air to the tradesman wearing the PAPR fully enveloping suit. The tradesman is not connected to a supply line to an external air supply.

e. As a result, the various contractors have failed or refused to pay the radiation work premium covered by section 17 Radiation Work Clause 1700E quoted above.

f. Accordingly, the Applicant requires an Order that the Responding Parties be required to pay IBEW Local 894 tradesmen performing radiation work the $12.00 per day radiation work premium required under the collective agreement as noted above.

8. The Responding Parties all filed a Request for Hearing and Notice of Intent to Defend/Participate in accordance with the Board's Rules of Procedure. The Board scheduled the matter for hearing on January 7, 2011. The date was adjourned by the parties. The parties subsequently agreed to have the matter set down for hearing on June 9, 2011.

9. Each of the Responding Parties filed a response, as required by the Board's Rules, on June 7, 2011. Paragraph 5 of the Response to Referral of Grievance to Arbitration (Form A-88) requires a responding party to set out all of the material facts on which the party relies. Each of the responding parties set out facts upon which it relies in support of its assertion that: (1) a PAPR is not a "plastic suit" or a "replacement material"; (2) a PAPR is not of the "fully enveloping type"; (3) a PAPR has no independent air supply; and (4) Article 1700E applies to suits worn in areas where there is tritium and PAPRS are worn in areas where there is no tritium.

10. At the commencement of the hearing on June 9, 2011, there were a number of preliminary or procedural issues that had to be determined. Bruce Power LP asserts that it is not bound to EPSCA/IBEW EPCO collective agreement and sought to have the grievance dismissed as against it. Canadian Union of Skilled Workers ("CUSW") asserted that it had bargaining rights with Bruce Power LP and thus had an interest in the dispute and was entitled to intervene. The IBEW objected to CUSW being granted intervenor status. In an effort to deal with the issue at the root of this grievance as quickly and expeditiously as possible, the Board indicated to the parties that it would first determine whether the wearing of the PAPR attracted the premium set out in Article 1700E and, only if that issue were determined in the affirmative, would it go on to deal with the issue as to whether the IBEW had any rights vis-a-vis Bruce Power LP, pursuant to which it was entitled to file a grievance. On the basis that the Board was not making any decisions at this juncture as to whether or not the IBEW had rights vis-a-vis Bruce Power, the Board ruled that CUSW would not be permitted to participate at this stage of the proceedings.

11. After sorting through these issues, the Board indicated that it would proceed with the hearing on the merits. Counsel for the applicant proceeded to give an opening statement. The majority of the opening statement focussed on whether a PAPR factually fits within the language of Article 1700E such that the wearing of the PAPR attracts the premium. At the very end of his opening statement, counsel for the applicant indicated that the applicant would present extrinsic evidence to support its interpretation of Section 1700E, as well as to support an estoppel argument. The particulars provided were that, on or about July 16 or 17, 2010 during negotiations for a renewal agreement, Mr. Couch, IBEW Local 804 Business Manager, "asked

and demanded an answer to whether it was the position of EPSCA that wearing the PAPR entitled tradespersons to the premium." Counsel went on to state "the answer given by EPSCA rep Mr. Starasts was yes the premium would get paid and as a result the IBEW required no change to the article." Counsel then indicated that the applicant was also relying on a "contractors practice to pay the premium to employees that were required to wear PAPR until E.S. Fox refused to do so at which time IBEW filed its initial grievance." No particulars were given of the "contractors practice" to pay the premium to employees required to wear the PAPR.

12. At this juncture, all of the responding parties voiced strenuous objection to the fact that the applicant had never, prior to counsel giving his opening statement, advised the responding parties of the allegation that Mr. Starasts had stated during bargaining that tradesmen wearing the PAPR were entitled to the premium or that the Union asserted a "past practice" of contractors paying tradesmen the premium for wearing the PAPR. The Board heard full submissions from all parties as to how the Board ought to proceed. The responding parties requested that the applicant be foreclosed from calling the evidence. The applicant argued that its past practice and estoppel arguments were all part of the grievance that had been filed and it should be permitted to call the evidence. The applicant indicated that any prejudice suffered by the responding parties as a result of the applicant having failed to give the responding parties advance notice of the facts it relies upon (and in the case of the past practice evidence, still had not provided) could be cured by granting the responding parties an adjournment.

13. After hearing the submissions of the parties, the Board ruled it would not permit the Union to call the evidence as to the contractors' past practice or what was said at the bargaining table. The Board proceeded to hear the applicant's first witness.

14. In the applicant's request for reconsideration, the applicant states as follows:

> 2. The Union respectfully submits that the Board erred in its June 9, 2011 decision for the following reasons:
>
> (a) The scope of the grievance and grievance referral include the issue of estoppel and a latent and patent ambiguity in the Collective Agreement and, therefore, these issues are properly before the Board of Arbitrators;
>
> (b) The Responding Parties abandoned the opportunity to obtain specifics in regards to the grievance by refusing to participate in the grievance procedure or a pre-hearing meeting; and
>
> (c) There is no prejudice to the Responding Parties should the Union lead such evidence given the Board's power to order full and proper particulars in response to a request when filed.
>
> 3. This reconsideration request raises significant and important issues of Board Policy in regards to the Board's role when acting as a grievance arbitrator, and the requirement for pleadings and particulars. The Board's decision in this case represents a marked departure from the consensual arbitration procedure and labour arbitration jurisprudence. Therefore the Union submits that this is an appropriate case for the Board to exercise its discretion under section 114(1) of the Labour Relations Act, 1995 and reconsider its decision of June 9, 2011.

15. The Board does not dispute that there is a wealth of arbitral jurisprudence that stands for the proposition that boards of arbitration must interpret grievances liberally in order to ensure that the grievance is dealt with on its merits (see: *Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 (Ont. C.A.). The Board, however, is not a consensual, private Board of Arbitration. The Board is a public administrative tribunal with established forms, processes and Rules of Procedure.

16. When the applicant decided to advance its grievance to arbitration, the applicant had the option of referring the grievance to a private, consensually appointed Board of Arbitration as provided for in section 1301 of the EPSCA/IBEW EPCO collective agreement or referring the grievance to the Board pursuant to section 133 of the Act. Had the applicant elected to utilize the services of a private, consensual Board of Arbitration, the jurisprudence that it relies upon may have been relevant. However, presumably because doing so gives the applicant access to a hearing before an experienced panel of construction industry adjudicators within 14 days of the filing of the application at a fraction of the cost of a private arbitration, the applicant elected to refer its grievance to the Board. Having elected to refer the grievance to the Board, the applicant was required to comply with the Board's Rules of Procedure.

17. The Board's Rules of Procedure provide:

> 2.4 No person will be allowed to present evidence or make any representations at any hearing or consultation of any material fact relied upon which the Board considers was not set out in the application or response and filed promptly in the way required by these Rules, except with the permission of the Board. If the Board gives such permission, it may do so on such terms as it considers advisable.
>
> ...
>
> 34.2 Before, or at the same time as, filing its application with the Board, the applicant must deliver the following to the responding party:
>
> (a) a completed copy of the application (Form A-86), including agreements, but not the collective agreement;...
>
> [as indicated above, Form A-86 requires an applicant to include in the application form all of the material facts on which it relies including the circumstances, what happened, where and when it happened, and the names of any persons said to have acted improperly.]
>
> ...
>
> 40.7 The Board may relieve against the strict application of these Rules where it considers it advisable.

18. Thus, according to the Board's Rules, when referring its grievance to the Board, the applicant was required to set out in its application form all material facts upon which it relies in support of its application. There is no dispute that the application filed by the applicant does not contain any material facts in respect of a past practice of contractors paying tradesmen the premium for wearing the PAPR nor any material facts in respect of what it is alleged was said

during the course of collective bargaining. Pursuant to Rule 2.4, the applicant may only present evidence of material facts that it has failed to set out in its application with leave of the Board.

19. The issue before the Board was thus whether the Board would grant the applicant leave to call evidence in respect of material facts that it had not set out in its application. The Board determined that it would not.

20. Whether or not the Board would grant the applicant leave to call the evidence is a matter within the Board's discretion. In this case, the grievance was served on the responding parties in November 2010. The very first time that the applicant mentioned that it alleged a past practice of contractors having paid tradesmen the premium for wearing the PAPR and that Mr. Starasts said at bargaining that the premium would be paid to tradesmen wearing the PAPR was in June 2011; over six months after the grievance was served. That is a very long period of time for the grievance to remain outstanding without the applicant informing the responding parties of very significant allegations of fact.

21. Had the applicant informed the responding parties of the material facts upon which it relies earlier in the process, it is possible that the responding parties may have looked into the allegations and taken a different approach to the litigation. Costs have been incurred by the responding parties in terms of filing responses, preparing for a hearing, and attending at a hearing that may not have been necessary, or may have been deployed differently, had the alleged material facts been pleaded in a timely manner.

22. While we do not assume that the passage of six months results in Mr. Starasts having forgotten what was said at collective bargaining, there can be no doubt that the passage of a further six months before Mr. Starasts could even be asked about the allegations will result in his having a less clear memory of events than would have been the case had he been questioned back in November or December 2010 when the grievance was filed. The responding parties are entitled to be advised of material facts in a timely way so that they can make enquiries and preserve evidence for the eventual hearing should it be necessary to do so.

23. The responding parties to this proceeding do not sit at the bargaining table. When the alleged facts as to what was said at collective bargaining were revealed during the applicant's opening statement, the responding parties were not in a position to know what was said at bargaining. Further, the responding parties were not in a position to quickly or easily contact Mr. Starasts, as he is a former employee of another contractor and is now retired. By not setting the material facts out in the application and only informing the parties of the material facts during opening statement, the applicant put the responding parties in the position of participating in the hearing in the absence of knowing the case against them or asking for an adjournment.

24. As indicated above, the applicant argues that any prejudice suffered by the responding parties can be cured by an adjournment. First, the Board would note that the applicant has still not provided full particulars with respect to the material facts it relies upon in respect of the contractors' past practice. However, even aside from that fact, adjourning Board proceedings in order to give a party time to investigate newly raised allegations is not a full answer. While it may, and in many cases would, cure any prejudice that the party may have suffered as a result of the unseemliness of the allegations, it causes other, significant problems. As indicated above, it wastes the time and resources of the parties. It also wastes the time and scarce resources of the Board. The Board is a publicly funded administrative tribunal with limited resources. Any day

of hearing consumed by one party, or wasted by a party, delays the outcome of not only that party's dispute but the outcome of the disputes of all of the other parties that are waiting in line to have their day at the Board. It is simply not an answer to adjourn every time a party fails to comply with the Board's Rules and announces the material facts upon which it relies during opening statements. The answer is to have parties comply with their obligations under the Board's Rules to the fullest extent possible, recognizing that latitude will be granted where the circumstances so warrant.

25. In the present case, it is also significant that the counsel involved in this matter are all well established, long-standing, construction counsel who are well known to one another and certainly well known to counsel for the applicant. A simple phone call the day before the hearing may have been sufficient to avoid this entire issue. It is remarkable that applicant's counsel would not have even mentioned to counsel for the responding parties, prior to the parties all paying their hearing fees, that there were significant material facts that had not been pleaded that the applicant intended to rely upon.

26. Thus, the Board's ruling arose as a result of the applicant having failed to comply with the Board's Rules and thereby placing itself in the situation where it required leave of the Board to adduce the evidence in issue. The Board considered the applicant's conduct; the lateness with which it notified the responding parties of the material facts both in terms of the number of months after the grievance had been served on the responding parties and the fact that no notification was provided until its opening statement was made; the ease with which the applicant could have notified the responding parties; the fact that the applicant's conduct likely resulted in increased costs to the responding parties; and the institutional needs and interests of the Board. The Board determined that it would not grant the applicant leave to adduce evidence of past practice or what it alleges was said at collective bargaining. The Board remains of the view that its ruling was correct in the circumstances of this case.

27. The request for reconsideration is denied.

2068-11-M United Food and Commercial Workers International Union, Local 175, Applicant v. **European Quality Meats and Sausages**, Responding Party

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union activities – One employee had been chronically late, was not able to use the employer's time clock system properly, did not effectively supervise his workers, and had made a serious error in a customer's order – The other employee had a habit of being unable to follow her work schedule and had been involved in a physical dispute with a customer – The Board noted that despite the possible misconduct of the terminated employees, there appeared to be a causal relationship between the employees' involvement in the union's organizing campaign and their discharge – The Board considered that there had been no serious discipline for the alleged misconduct until the organizing drive – The

two employees that had been terminated had signed up 24 of 32 new union members – The Board found that the union may suffer irreparable harm in terms of its organizing campaign and in obtaining a vote that is reflective of the true wishes of the employees if interim relief of reinstatement was not granted – The balance of harm favoured granting the order – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint and ordered the employer to post a copy of the decision and a Notice to Employees about the decision in the workplace

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Simran Prihar, Mike Mattioli, Tony Nigro, Jane Maxwell, Lindsay Keith Nightingale* and *Richard Wauhkonen* for the applicant; *Allen Craig, Sandy Leider, Mike Leider* and *Jose Vizinho* for the responding party.

DECISION OF THE BOARD; October 12, 2011

1. This is an application for an interim order under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). It was filed on September 22, 2011. There is a pending unfair labour practice complaint (Board File No. 2069-11-U) which will be dealt with by the Board at a later date.

2. The responding party, European Quality Meats and Sausages ("EQMS") operates a meat processing factory outlet and storefront on Jutland Road in Toronto. Lindsay Nightingale and his common law spouse Ms. Jane Maxwell were terminated from their employment at that location on Tuesday, September 20, 2011. The parties do not agree on the reasons for the terminations. The applicant ("the UFCW" or "the union") contends that the terminations were unlawfully motivated, as a result of Mr. Nightingale's and Ms. Maxwell's involvement in an organizing drive, and seeks, among other things, their interim reinstatement. The employer takes the position that Mr. Nightingale and Ms. Maxwell were legitimately terminated for misconduct, and in any event, that it had no knowledge of their involvement in any organizing campaign. As for the campaign itself, the employer's Retail Operations Manager, Mike Leider states in his declaration that, since the certification of the union at another of the EQMS locations in May 2011, there has been general talk about unions in the workplace; and he admits he overheard a conversation between employees on September 16, 2011 about a possible union organizing drive (which the union contends began on August 9, 2011).

3. This application for interim relief is governed by section 98 of the Act. The union contends that all the elements of section 98 are satisfied, thus warranting reinstatement of Mr. Nightingale and Ms. Maxwell. The employer does not challenge the UFCW's assertion that there was an organizing campaign underway when the terminations took place (thus satisfying paragraph 1 of subsection 98(2)), but says the union has not established any of the other criteria in subsection 98(2) or (3).

4. A number of declarations have been filed in this matter. Mr. Nightingale, Ms. Maxwell, and two Organizing Representatives, Tony Nigro and Mike Mattioli have made declarations on behalf of the UFCW. Declarations on behalf of EQMS have been made by Mr. Leider and Jose Vizinho, the Store Manager.

5. This matter proceeded by way of consultation on October 4, 2011. At the outset I indicated to the parties that the purpose of the consultation was to elicit further information to enable the Board to answer the questions posed by the provisions of section 98. I also indicated that the inquiry was not for the purpose of making findings of fact whether or not an unfair labour practice had been committed. That function is left to the panel of the Board assigned to the pending complaint.

6. During the next stage of the consultation, I asked questions of all the declarants except Mr. Nigro. Counsel for each party was given an opportunity to pose any questions arising from mine. Counsel for EQMS declined the opportunity, and counsel for the union posed two questions to Mr. Vizinho and made approximately three inquiries of Mr. Leider.

7. Having regard to the pleadings, the declarations, and the answers of the declarants, the following constitutes the information upon which I have made my decision.

8. The number of employees at the Jutland Road facility who might conceivably be included in a bargaining unit is in the low-to-mid fifties.

9. Mr. Leider has ultimate responsibility for the facility, but Mr. Vizinho takes care of the day-to-day operations. Both Mr. Leider and Mr. Vizinho have the authority to dismiss employees. According to Mr. Leider, they generally carry out this function together, collaboratively, but they each have an independent authority to terminate.

10. It appears undisputed that the UFCW's organizing drive began on August 9, 2011 when Mr. Nightingale contacted Mr. Nigro. Mr. Nightingale met with some co-workers on August 16, 2011 and signed several of them to union membership. He spoke to employees at work and encouraged them to join the union. Similarly, Ms. Maxwell became involved in the campaign, signing up employees and encouraging others to do the same. Between the two of them, they signed up 24 of 32 new union members (17 by Mr. Nightingale, 7 by Ms. Maxwell) between August 16, 2011 and September 19, 2011. One other employee also acted as an inside organizer.

11. According to Mr. Mattioli, following the termination of Mr. Nightingale and Ms. Maxwell on September 20, 2011, the union was unable to sign up any new members. Anyone the union approached after that date was unwilling to sign for fear of job loss, even those individuals who the UFCW had reason to believe were previously favourably disposed toward the union.

12. Mr. Nightingale had been employed as a meat cutter since December 2005 (and also before then, from 2001 until 2004 when he resigned). He reported to Mr. Vizinho.

13. According to Mr. Leider, Mr. Nightingale had been performing very poorly for at least a year prior to his termination. First, there had been chronic lateness. He was allegedly late at least 76 times in the last year. Mr. Nightingale conceded that he had received a one-day suspension in August 2010 for lateness, and two subsequent verbal reprimands for the same offence on August 10, 2011 and September 13, 2011. Secondly, Mr. Leider contends that Mr. Nightingale frequently neglected to punch in and out of work properly using the employer's time clock. Mr. Nightingale agrees that he received written discipline for this on August 26,

2011. In that letter, Mr. Leider noted five improper time-clock punches from May 2011 until August 25, 2011, and warned that if it continued, Mr. Nightingale could expect progressive discipline eventually leading to suspension and finally termination. Thirdly, Mr. Leider contends that Mr. Nightingale did not ensure, in his capacity as a supervisor, that the employer's hygiene and sanitation procedures were carried out by those workers under his direction. Mr. Nightingale disputes the extent of his responsibility in this regard, but he allows that in August 2011 he was instructed by Mr. Leider to ensure that the other meat cutters properly sanitized their knives, and he claims that he issued instructions to that effect to the employees. It is agreed that Mr. Nightingale was never formally disciplined for failing to adhere to the employer's procedures on hygiene and sanitation. Fourthly, Mr. Leider asserts that Mr. Nightingale frequently made errors in production orders. On or about September 15, 2011, an order for which Mr. Nightingale was responsible was seventeen pounds short. This resulted in a delay in shipping the order until Mr. Nightingale corrected the error. This incident was noted in a termination letter to Mr. Nightingale as one of the reasons for his termination. There is no dispute that, to the extent there were other production errors committed by Mr. Nightingale in the past, they were not the subject of any formal discipline.

14. The employer produced some documentary information which suggests that, as early as June 2011, EQMS was looking to find a replacement for Mr. Nightingale. Furthermore, the employer contends that, a few weeks prior to Mr. Nightingale's termination, it hired a new butcher, and that Mr. Leider determined that the new butcher could replace Mr. Nightingale with some additional training and experience.

15. As I have indicated, Mr. Nightingale's employment was terminated on September 20, 2011. Mr. Leider told the Board that he had intended to terminate Mr. Nightingale soon after Labour Day, as that marked the end of the employer's busy season. However, Mr. Vizinho was on vacation until September 16, 2011, the day Mr. Leider overheard employees talking about a possible union campaign. Mr. Leider was away from the workplace form September 16 to 18, 2011. He took September 19, 2011 off. When both he and Mr. Vizinho were present at the workplace on September 20, 2011 they carried out the termination of Mr. Nightingale and Ms. Maxwell.

16. I turn next to the circumstances surrounding Ms. Maxwell's termination.

17. About three or four weeks prior to her termination, Ms. Maxwell was working in the employer's retail snack bar preparing customer orders. (Like Mr. Nightingale, she had two discrete periods of employment with EQMS, and had been working continuously since December 2005.) Her immediate supervisor at the time was Ana Sousa. A customer became upset about her order, and began raising her voice. Ms. Maxwell left her work station and approached the customer. There is a dispute whether or not Ms. Maxwell was also agitated and swearing. She says she approached the customer for the purpose of directing her to Ms. Maxwell's immediate supervisor, Ana Sousa, to resolve the complaint. There is no dispute that Ms. Maxwell placed her hand on the customer's arm. Ms. Maxwell says she did so lightly, in order to direct her toward Ms. Sousa. The customer took further offence. Later, the customer's husband called Mr. Leider, complaining about the incident, which he termed an assault, and claiming that the customer's arm was bruised. He threatened to call the police. Mr. Leider said he would investigate the matter.

18. Mr. Leider says he spoke to a co-worker of Ms. Maxwell's, a woman by the name of Patricia, who Mr. Leider claims was present in the snack bar. (He contends that Ms. Sousa was

not there, or did not see the incident.) It is not clear to me what Patricia told Mr. Leider, and in any case, it would appear the employer did not seek her out to provide a declaration for use in this proceeding.

19. Mr. Leider also spoke to Ms. Maxwell. She admitted to touching the customer, but not to an assault. Mr. Leider agrees with Ms. Maxwell that, at the time of their discussion, he indicated to her that he did not think her job was in jeopardy. He claims, however, that he went on to say the decision was not his alone to make, and that he would have to discuss it with the management team, namely the employer's President, Vice-President and in-house legal counsel. This additional detail is not referenced in Ms. Maxwell's declaration, and as far as she was concerned, based upon Mr. Leider's assurances, she would not lose her job as a result of the incident. Mr. Leider did not interview the complaining customer.

20. In justifying Ms. Maxwell's dismissal three or four weeks later, the employer relied not only upon the above-described incident, but upon Ms. Maxwell's alleged habit of failing to follow her work schedule. The employer says she punched in too early or too late on about ten occasions from September 5, 2011 until her termination on the 20th. Mr. Leider's declaration was accompanied by two pro-forma letters authored by Ms. Sousa and addressed to "Jane", both for arriving early for the start of her scheduled shift. One of the letters is dated September 19, 2011 at the top, but August 19, 2011 at the bottom in the line next to the blank line that would have contained Ms. Maxwell's signature acknowledging receipt of the letter. Ms. Sousa did not file a declaration in this matter and was not present at the consultation to explain this apparent discrepancy. The other letter is dated September 6, 2011. For her part, Ms. Maxwell told the Board that she had not received either of these letters, although she conceded Ms. Sousa spoke to her once in the period preceding her termination about coming in to work too early.

21. It is not clear which termination interview proceeded first. Mr. Leider and Mr. Vizinho took part in Mr. Nightingale's termination meeting; and Mr. Leider and Ms. Sousa participated in Ms. Maxwell's. Mr. Leider's declaration refers to a termination letter in each case. In his declaration, which is dated September 27, 2011, Mr. Leider gave the impression that the termination letters were still to be sent out to the dismissed individuals together with the Records of Employment. At the consultation, however, Mr. Leider stated that he had prepared the letters with the intention of issuing them to both dismissed employees at the conclusion of the termination interviews. However, at the end of each meeting, somehow neither Mr. Nightingale nor Ms. Maxwell returned to Mr. Leider's office, as he expected them to, following their escort by Mr. Vizinho and Ms. Sousa respectively to collect their respective belongings. Thus the letters were never hand-delivered. Nevertheless, Mr. Leider assured the Board that the letters were sent out a day or two after the termination interviews (i.e, on September 21 or 22, 2011).

Analysis and Conclusions

22. The provisions of section 98 of the Act directly relevant to this matter are as follows:

> **98.** (1) On application in a pending proceeding, the Board may,
>
> ...

> (b) subject to subsections (2) and (3), make interim orders requiring an employer to reinstate an employee in employment on such terms as it considers appropriate; and
>
> ...
>
> (2) The Board may exercise its power under clause (1)(b) or (c) only if the Board determines that all of the following conditions are met:
>
> 1. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway.
>
> 2. There is a serious issue to be decided in the pending proceeding.
>
> 3. The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.
>
> 4. The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.
>
> (3) The Board shall not exercise its powers under clause (1)(b) or (c) if it appears to the Board that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights under the Act by an employee.
>
> (4) Despite subsection 96 (5), in an application under this section, the burden of proof lies on the applicant.

23. The scheme of section 98 is such that the union must establish on a balance of probabilities all of the conditions in subsection 98(2). If it does so, then the Board must consider whether, under subsection 98(3), the impugned act of the employer appears unrelated to the exercise of rights under the Act by an employee.

The criteria under subsection 98(2) of the Act

24. The employer conceded that the circumstances giving rise to the pending unfair labour practice proceeding occurred at a time when a campaign to establish bargaining rights was underway, and, based upon the union's uncontradicted information, I so find. Moreover, the employer did not advance any compelling argument that there is not a serious issue to be decided in the pending proceeding. It seems beyond debate that Mr. Nightingale and Ms. Maxwell were inside union organizers, and their employment came to an end as the organizing campaign was unfolding. Counsel for the employer questioned the extent of Ms. Maxwell's contribution to the organizing drive, but in real terms, she was responsible for over 20 per cent of the collected cards and that is anything but insubstantial. The dismissals of inside organizers raise a serious issue. In fact, in *K2 Electrical Contracting Ltd.*, [2006] OLRB Rep. May/June 375, the terminated employee who was reinstated by the Board had never acted in the capacity as an inside organizer, but had merely intended to fulfill that role. Accordingly, paragraph 2 of subsection 98(2) is also satisfied.

25. Regarding the issue of irreparable harm/labour relations purpose in paragraph 3 of subsection 98(2), counsel for EQMS submits that the Board ought to take into account the fact that, at the time of the terminations, the union had more than 60 per cent membership support. I am not persuaded that the level of union support matters for purpose of subsection 98(2)3. What is of significance, among other things, is the impact of the terminations on the organizing drive. From the uncontested information provided by the union, the impact appears to have been sudden, dramatic and potentially devastating to the union's campaign. Immediately prior to the dismissals on September 20, 2011, a substantial portion of the bargaining unit members remained to be organized. The terminations, however, appear to have cut the union off from any real opportunity to make further gains, and may have dampened any possibility of a fear-free vote should an application for certification have followed. After the dismissals, no one, not even those seemingly previously disposed favourably to the union, were interested in talking to or signing up with the union because, according to Mr. Mattioli, they were fearful for their jobs. In my view, the union has established that its organizing campaign will suffer irreparable harm unless Mr. Nightingale and Ms. Maxwell are reinstated. Accordingly, paragraph 3 of subsection 98(2) is satisfied.

26. With respect to the balance of harm referred to in paragraph 4 of subsection 98(2), the employer says it will suffer the greater harm than the union if the reinstatements are ordered. It contends that employee morale and health and safety will be compromised by having to place Mr. Nightingale and Ms. Maxwell back in their positions. The employer asks that the Board take note that this is, in part, a retail operation, and to view Ms. Maxwell's termination as a business decision in that context. Moreover, the employer submits there was convincing information to show that EQMS was intent upon replacing Mr. Nightingale well before the union's campaign commenced. To put the two individuals back in their positions will send a message to employees that they can flout the employer's rules and expectations because the object of union organizing trumps all other concerns.

27. As I have indicated, the union may suffer irreparable harm to its organizing campaign and to the prospect of obtaining a vote reflective of the true wishes of the employees if the two inside organizers are not reinstated. With respect to Mr. Nightingale, the employer appears to have tolerated much of the conduct it complains of. If indeed Mr. Nightingale has, for example, been late 76 times in the last year, or has frequently made errors in making up meat orders, EQMS has not responded with much in the way of progressive discipline. It may well be that the employer has a low opinion of Mr. Nightingale, and even that for some time now it has formed an intention to replace him with a higher functioning individual. But it is difficult to imagine that reinstating him pending the outcome of the unfair labour practice complaint will undermine the employer's rules and expectations.

28. As for Ms. Maxwell, it must be borne in mind that the employer waited three or four weeks after the customer confrontation before taking any action against her. That weakens the employer's argument on the balance of harm. If indeed the employer had wished to make a point to its employees concerning workplace violence and health and safety generally, it ought not to have delayed taking action against Ms. Maxwell, and, if it really believed she had committed an assault of one of its customers, it ought to have considered laying a complaint with the police.

29. For these reasons, I conclude that the union clearly has more to lose than the employer in the assessment of balance of harm. Paragraph 4 of subsection 98(2) is satisfied.

Subsection 98(3)

30. As the Board stated in *Patrolman Security Services Inc.* 2005 Can LII 38038 (ON LRB), when applying subsection 98(3),

> ...the Board's task is not to make findings of fact or credibility but on the contrary, to determine in a summary way, whether there is an appearar of a causal relationship between the exercise of rights under the Act and the discharges...In this sense, the inquiry is like a preliminary assessment of the quality or robustness of the evidence likely to be heard and tested in the pending application. ¶66

31. In this case, having reviewed the material and having questioned most of the declarants, I find there is an appearance that the terminations were causally related to the exercise of rights under the Act.

32. I am compelled to this conclusion on the basis of the following information:

i. The timing of the terminations. The individual who carried out the terminations, Mr. Leider, heard talk in the workplace about the union over the summer. He overheard employees discussing a possible union organizing campaign on September 16, 2011 (on a day, coincidentally, that he says he was away from the workplace at a fundraiser). The termination interviews were conducted four days later. Mr. Leider had independent authority to dismiss employees. He could have dismissed Mr. Nightingale and Ms. Maxwell much earlier in the month of September, on his own. Instead he waited for the return of Mr. Vizinho. The rationale for that escapes me, because according to the employer, the decision to replace Mr. Nightingale had been taken several months prior. Furthermore, Mr. Vizinho was not Ms. Maxwell's immediate supervisor and he did not, in fact, take part in her termination interview. Accordingly, the reason offered for the delay in discharging both Mr. Nightingale and Ms. Maxwell is suspicious.

ii. The employer's change in attitude towards Ms. Maxwell's confrontation with the customer. Mr. Leider appears to have taken Ms. Maxwell's offence fairly lightly on first blush, to the extent that he stated he was unlikely to fire her for it. The employer's subsequent about-face concerning the incident involving Ms. Maxwell and the customer has not been explained satisfactorily.

iii. The termination letters were not hand-delivered to either of the dismissed employees. It strikes me as odd that Mr. Leider prepared termination letters and then coincidentally in both instances the two employees, escorted by different managers to collect their belongings, were not escorted back to Mr. Leider's office to pick up their letters.

iv. Ms. Sousa did not complete a declaration. This is significant because the employer relied upon discipline that Ms. Sousa had imposed on Ms. Maxwell as part of the reason for her termination.

33. While it may be that Mr. Nightingale and Ms. Maxwell engaged in varying degrees of misconduct, there appears to be a causal relationship between their involvement in the union's organizing campaign and their discharge. Whether in fact there is an actual causal connection remains to be determined in the pending unfair labour practice complaint. For the purposes of this interim application, the union has satisfied the elements of subsection 98(3) of the Act, and I so find.

***

34. In summary, the union has met its burden of proof under section 98 with respect to its request that Mr. Nightingale and Ms. Maxwell be reinstated on an interim basis.

35. The employer is to reinstate Mr. Nightingale and Ms. Maxwell immediately to their employment on the same terms and conditions they enjoyed immediately preceding their termination.

36. I hereby further order EQMS to:

(i) refrain from suspending, discontinuing or otherwise terminating Mr. Nightingale's or Ms. Maxwell's employment or otherwise changing the terms and conditions of their employment until the Board issues a final decision in the pending unfair labour practice complaint in Board File No. 2069-11-U ; and

(ii) post separately a copy of this decision and the attached Notice to Employees for not less than 30 days in a location where the employees are likely to see them.

Appendix "A"
The Labour Relations Act, 1995
NOTICE TO EMPLOYEES
Posted by order of the Ontario Labour Relations Board

We have posted this notice in compliance with a direction of the Board, issued after a proceeding in which both the company and the union had the opportunity to make submissions.

The Board has ordered European Quality Meats and Sausages to reinstate Lindsay Nightingale and Jane Maxwell ON AN INTERIM BASIS until the Board considers the reason for their terminations. A hearing before the Board will commence soon. A purpose of that hearing is to determine why Lindsay Nightingale and Jane Maxwell were terminated.

If the Board ultimately determines that Lindsay Nightingale and Jane Maxwell were terminated for reasons that had nothing to do with their support for the Union, the temporary reinstatement order will be revoked, and the European Quality Meats and Sausages will no longer be required to employ them.

If the Board ultimately finds that their terminations occurred because they were union supporters, exercising their rights under the *Labour Relations Act,* 1995, as amended the Board may confirm their reinstatement, and direct that they be compensated for all earnings and benefits lost as a result of their terminations.

Employees in Ontario have these rights which are protected by law:

An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.

An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.

An employee has the right to cast a secret ballot in favour of, or in opposition to, a trade union if the Ontario Labour Relations Board directs a representation vote.

An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights under the *Labour Relations Act, 1995*, as amended.

> An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*, as amended.
>
> An employee has the right to remain neutral, to refuse to sign documents opposing the union or to refuse to sign a union membership card.

It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filed with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*, as amended.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 30 consecutive days.

DATED this 12th day of October, 2011.

3564-10-G Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 Applicant v. **Hydro One Inc.**, Responding Party

Construction Industry Grievance – The union grieved after the employer ordered six employees not to report for work on a day the employer scheduled a foremen meeting – The union asserted the employees were suspended without cause rather than laid-off because a lay-off required there to be a shortage of work – In the alternative, if there was a lay-off, the union argued the employer breached the lay-off provisions of the collective agreement because employees with less seniority than the grievors were permitted to report to work on the relevant day – In response, the employer relied on the standoff provisions of the collective agreement which allowed it to standoff part or all of a crew if the crew was unable to proceed with work – The employer asserted the grievors were unable to work because there were no foremen available to supervise them – The Board held the employer acted properly within its rights under the standoff provisions of the agreement – The Board reasoned a standoff is a type of short duration lay-off but the parties clearly differentiated between the two in the collective agreement – Specifically, the collective agreement did not stipulate a standoff could only occur due to a shortage of work or provide seniority-based bumping rights in such circumstances – The Board further reasoned the employer made a *bona fide* operational decision and was not obligated under the agreement to pursue or implement alternative scheduling options such as overstaffing other crews or hiring additional foremen – Grievance dismissed

BEFORE: *John D. Lewis*, Vice-Chair.

APPEARANCES: *L. A. Richmond, B. MacKinnon, A. MacKay* and *D. Brown* appearing for the applicant; and *Scott T. Williams, Bruce Young, Amanda Costa, Keith Gilbert, Heather White, Glen Gallaher* and *James Harvey* appearing for the responding party.

DECISION OF THE BOARD: September 19, 2011

1. This application is a referral of a grievance to arbitration pursuant to section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). This grievance concerns six (6) members of the Labourers' International Union of North America, Local 1059 ("LIUNA 1059") who were notified on November 11, 2010 that they should stay home on Friday, November 12, 2010 and not report for work until Monday, November 15, 2010. LIUNA 1059 asserts these individuals were either improperly laid off or improperly suspended in breach of the relevant terms of the collective agreement between the Electrical Power Systems Construction Association ("EPSCA") and the Labourers' International Union of North America, Ontario Provincial District Council ("LIUNA OPDC") (the "Collective Agreement"). EPSCA was accredited by the Board to bargain on behalf of a group of employers (Hydro One Networks Inc. ("HONI") being one such employer) in relation to a group of employees who are represented by LIUNA OPDC. LIUNA 1059 is an affiliated local union of LIUNA OPDC.

2. HONI asserts that it has not breached the Collective Agreement. Its position is that it informed the six (6) labourers on November 11, 2010 that it was utilizing the standoff provisions (Article 22) of the Collective Agreement. As such, the six (6) labourers were stoodoff duty on November 12, 2010 for bona fide business reasons and returned to work on Monday, November 15, 2010.

The Evidence

3. The hearing into this matter took place on February 9 and June 6, 2011. Certain facts were agreed to by the parties as follows:

> 1. The Respondent notified the grievors, Kirby Holmes, Glen Urie, Dave Armstrong and Norbert Silva not to attend work on November 12, 2010.
>
> 2. The Notice was provided during the grievors' normal working hours on November 11, 2010. Two of the grievors, Armstrong and Silva were performing labourer work on the Woodstock to Ingersoll line at the time and the grievors Kirby and Urie were performing labourer work associated with the Bruce to Milton line.
>
> 3. The parties agree that at least some of the grievors had greater seniority than the remaining labourers who worked on lines crews in the 1059 work jurisdiction on November 12, 2010 performing normal labourers work on the on-going Milton-Bruce line project.
>
> 4. The parties reserve the right to lead evidence on the particulars of paragraph 2 at a later date should it be necessary.

4. In addition to the above agreed to facts, the Board heard evidence from two (2) witnesses called by HONI, Mr. Bruce Young ("Young"), an Area Construction Manager ("ACM"), and Mr. Keith Gilbert ("Gilbert"), a Sr. Civil Foreman in the CUSW bargaining unit. Both Young and Gilbert gave their evidence in a credible manner, and to a large extent, their evidence is not the subject of dispute. The agreed to facts and the evidence of the two (2) witnesses provides the factual background against which the Board must interpret the relevant articles of the Collective Agreement.

5. Young is an ACM in the Lines Department and has worked for HONI, and its predecessor, since 1986. He has been an acting General Foreman for approximately six years. Young testified that it was his decision to schedule a meeting with all of his foremen on Friday, November 12, 2010. Young indicated he tried to have these meetings quarterly. The purpose of this meeting was to discuss various operational issues on the lines; as well the crews were moving to eight (8) hour shifts. In addition, there were to be some guest speakers who would talk on various topics.

6. Young is responsible for managing the Bruce-Milton Transmission Line Project. This project consists of building and installing 750 high voltage tower structures over a 176 km line. The project started in May of 2010 and is targeted for completion the end of 2012. Labourers, Carpenters, Rodmen, Operators and Teamsters are all working on this Project. Young testified he has two (2) Sr. Foremen who look after the crews on this project. Each Sr. Foreman is responsible for eight (8) crews. There are sixteen (16) foremen, one for each crew, with an unknown number of subforemen. He acknowledged that HONI has the right under the Collective Agreement to select both foremen and subforemen.

7. Young's Sr. Foreman, Gilbert, was the individual responsible for determining how the operations would continue to run on November 12, 2010, given the fact that all of the foremen were to attend the meeting. In this regard, Young's evidence was that typically a crew would not

be allowed to work unsupervised for a full day. As a result, it was up to Gilbert to determine how to back fill the crews with subforemen in order to cover the foremen's absences from their assigned crews on November 12, 2010.

8. Young confirmed his understanding that on November 12, 2010, of the approximately forty (40) labourers assigned to the various crews he was ultimately responsible for managing, thirty-four (34) worked on November 12, 2010 and six (6) labourers (the grievors in this matter), were stoodoff and did not work. As far as Young knew the other crews who worked that day were supervised by subforemen.

9. As it relates to the six (6) labourers who did not work on November 12, 2010, Young agreed these individuals were not sent home for doing anything wrong. He agreed these individuals would have worked that day but for the fact that there was no replacement supervisor for them. Young discussed the manning situation with Gilbert and indicated he authorized the use of standoff, however, there was no specific discussion as to who should be stoodoff. Young left the selection up to Gilbert. Young's evidence was that he had never authorized a one day standoff before and that, in the past, he had never had to send people home as a result of the foremen meetings. He also indicated that a standoff typically occurs in the rainy season where work on a project is prone to periods of interruption.

10. Young acknowledged that it was his understanding that one of the greivors, Terry Robinson, was a subforeman. He also agreed that as far as he knew the other labourer crews that did work on November 12, 2010 were supervised by subforemen. He agreed that HONI has the ability to ask the union hiring hall to supply foremen or subforemen but indicated HONI has not used that method. Young also indicated that individuals from other trades were stoodoff on November 12, 2010.

11. Gilbert is a Sr. Foreman from the CUSW bargaining unit who has worked for HONI, and its predecessor, for approximately thirty-eight (38) years. Gilbert gave evidence that it was his decision to standoff the six (6) employees involved in this grievance on November 12, 2010. Gilbert did not choose these six (6) individuals on the basis of their dates of hire and did not look at a seniority list. Rather, these employees were selected as Gilbert was unable to arrange adequate supervision for the crews that these individuals worked on, that made operational and economic sense. Gilbert acknowledged that standoff is usually used when roads are bad in the spring season but added it has also been used for shortage of work situations. Gilbert testified that, in the past, he has stoodoff employees for the duration of only one (1) day.

12. Gilbert testified that it has been HONI's practice, for at least the last five (5) years, not to allow crews to work unsupervised without either a foreman or subforeman. In this regard, he testified that while Terry Robinson was a subforeman, in discussions with Robinson's supervisor, Jamie Harvey, they had reached the conclusion that Robinson did not yet have the experience and was not yet ready to supervise a foundation crew on his own. As a result, Gilbert was not able to find a viable replacement for Harvey, who had to attend the foremen's meeting on November 12, 2010. Therefore, Gilbert notified Robinson, and the others on that particular foundation crew (i.e. Holmes, Urie and Travis Cool), that they would be stoodoff on November 12, 2010. Likewise, Gilbert could not find a viable replacement for Ken Morrison, a foreman of one of the road crews. As a result, the grievors Armstrong and Silva were informed on November 11, 2010 that they would be stoodoff the next day.

13. Gilbert testified that he was not aware of any other qualified or viable subforeman, at least not within his group of crews, that reported to him. He testified that he had adequate subforemen and a full complement of labourers as it pertained to his other crews and, as a result, the six (6) individuals in this matter were selected for standoff. In cross-examination, Gilbert willingly admitted that, at the time of making his decision to standoff these six (6) individuals, he was not aware that Armstrong may have been a subforeman in the past. He indicated that if Armstrong had been a subforeman it may have been at Stations, however, Armstrong had never served in the subforeman capacity reporting to Gilbert at Lines.

14. In response to the suggestion proposed by union counsel, that Gilbert could have deployed Robinson to be the subforeman of the road crew that was stoodoff, Gilbert indicated such was not a practical option. This option, in all likelihood, would have required Robinson travelling 160 km from the Glamis Yard on Thursday, November 11, 2010, so that he could be oriented to the site. Gilbert testified that a supervisor would have had to orient Robinson to the site and that would have taken a couple of hours. In his mind, it would be too far for Robinson to go to cover off just one day. Gilbert acknowledged he never canvassed this option with Robinson nor did he canvass it with Ken Morrison, the foreman that Robinson would have been replacing.

15. At the Foremen's Meeting that took place on November 12, 2010, Gilbert acknowledged a number of the foremen had travelled over 100 km to be there and that some may have travelled the day before and stayed over. He also indicated a number of new foremen attended for the first time and that the group discussed incident reporting; how to properly fill out forms; and the various projects under Young's control. He confirmed that there were guest speakers and that the meeting lasted nearly the whole work day.

16. Counsel for the union, in cross-examination, explored other alternatives that may have been available to Gilbert rather than standing down the two (2) crews. Gilbert responded that the other foundation crew on November 12th was supervised by subforeman John DiMico and that it already had a full complement of labourers. Likewise, Chris Pawley, who was a subforeman, had already been deployed to replace the foreman at the Glamis Yard. Gilbert agreed that if he had moved Robinson to Woodstock to supervise Armstrong and Silva, that would have left only three (3) labourers to find work for, however, he again reiterated that due to the time and distance involved he chose not to proceed in this fashion. Also, Gilbert knew the other crews already had full complement and so he did not check other places and canvass if they needed extra personnel. Gilbert admitted he did not ask any of the foremen who work at Stations to keep an eye on things at Lines. Gilbert explained "their work is separate from ours" and "the managerial ranks do not cross-over like that". Likewise, Gilbert did not check to see if any access roads were being constructed at the Bruce and whether they might need extra labourers. He did not check this out due to the vast distances that would have been required to be travelled for just one (1) day.

17. In re-examination, Gilbert testified that calling the union hiring hall for foremen or subforemen was not a viable option as any referrals would need at least a one (1) day orientation to the particular job, and it goes against the rationale for training subforemen in particular workgroups so that they are the ones that are called upon to backfill, when necessary. Gilbert could not recall situations where HONI had staffed a crew in excess of its stated complement. Further, no supervisors had indicated to him that any extra men were needed for work on November 12, 2010.

Relevant Collective Agreement Provisions

18. Set out below are the relevant provisions of the Collective Agreement that were referred to by the parties:

> ARTICLE 12 - LAYOFF PROCEDURE
>
> 12.01 During staff reductions the Employer shall layoff the last employee hired provided the remaining employees are able to perform the work currently underway as follows:
>
> (a) in all layoff situations (other than those impacting a crew as outlined in 11.06) transferees will be laid off (or transferred back) prior to members of the local union having jurisdiction where the work is being performed.
>
> (b) For crews constituted under Article 11.06, the ratios established under 11.06 shall be maintained as closely as possible.
>
> 12.02 Subject to Article 13.10, the employer shall have the right to move foremen from construction site to construction site.
>
> When a requirement for foremen no longer exists, the treatment of foremen shall be as follows:
>
> (a) Foremen who are transferred into, or hired as a Foreman at, a Hydro One construction site as a foreman shall be laid off as a foreman or transferred out to another Hydro One construction site as a foreman.
>
> (b) An employee who has been promoted to the foreman level by the Employer during the course of his employment on a Hydro One construction site, shall not be subject to (i) above and will be reduced to a working position at such site. For layoff purposes, the employee will then be subject to Article 12.01.
>
> ARTICLE 15 – PAY PROCEDURE
>
> 15.02 ON TERMINATION
>
> ...
>
> (b) An employee who is laid off from a Lines and Stations construction site will have his final pay and termination documents mailed to his last known address on file with the Employer within eight (8) working days of termination. This does not preclude an employee being issued his final pay and termination documents on the job prior to the five period. After 48 hours of notifying the Employer, the Employee will be entitled to four (4) hours at straight time for each normal workday for which there is non-compliance thereafter. The Employer will provide a Record of Employment (ROE) Form in the employee's final pay or will send the ROE information electronically to Service Canada within the timelines specified in Article 15.02.

...

(d) Employers will provide one hour's notice of layoff or one hour's pay in lieu of notice to employees who are to be laid off. When possible, the Employer shall notify the Local Union three (3) days prior to layoff.

ARTICLE 17 – REPORTING PAY ON 8 HOUR AND 10 HOUR SHIFTS

17.01 An employee who reports for work, unless directed not to report the previous day by his Employer, shall receive a minimum of a half shift's pay (4 hours or 5 hours) at the applicable rate when he reports for work, but is given no opportunity to work because none is available. This allowance will be paid to an employee if he is requested to report for any part of the first half of a shift and an additional half shift's pay (4 hours or 5 hours) will also be paid if he is requested to report for work for any part of the second half of the same shift. It is not intended by this Section that an employee receive a reporting pay allowance greater than his pay for normal daily hours.

17.02 An employee in receipt of reporting pay shall also receive travel or board allowance, if applicable.

17.03 Notwithstanding that work is available and an employee is able to commence or continue work, the Employer may shut down a job to avoid the possible loss of human life because of an emergency situation such as H2S leaks, bomb threats, fire, etc., that could endanger the life and safety of an employee. In such cases, employees will be compensated only for the actual time worked.

ARTICLE 22 – STANDOFF

22.01 When unable to proceed with his work, an Employer may elect to Standoff part or all of his crew. The parties agree Standoff is not intended to circumvent the layoff procedure.

The Employer reserves the right to Standoff its employees without pay up to a maximum of ten (10) consecutive working days. Notification of Standoff will be made by the Employer during normal working hours. A Record of Employment will be issued electronically upon the commencement of Standoff. No travel allowance will be paid to an employee for the Standoff period. Subsistence allowance will only be paid when proof that temporary residence is being maintained is provided. Proof of residency will be in a form acceptable to Management such as a Landlord receipt, hotel/motel receipt, etc.

22.02 An employee who qualifies for subsistence allowance and who is placed on Standoff will be paid subsistence allowance up to a maximum often (10) consecutive working days.

22.03 If Standoff continues beyond ten (10) consecutive working days, an employee, at his option, may elect to remain on Standoff for an additional twenty (20) consecutive working days or be removed from Standoff. The Employer retains recall rights on employees electing to continue on

Standoff. Subsistence allowance will cease after ten (10) consecutive working days on Standoff.

22.04 If an employee elects layoff beyond the tenth (10th) consecutive working day, it shall be carried out in accordance with the terms of the Layoff/Seniority provisions of this Collective Agreement. An employee laid off will be issued a Record of Employment form on his date of layoff indicating "Layoff - Shortage of Work". The Employer does not retain recall rights if the employee elects Layoff.

22.05 Standoff shall only continue beyond thirty (30) consecutive working days with the mutual consent of the Employer and the Union, in writing.

For the purpose of this Article, when working on a 4 x 10 hour shift arrangement, the following will apply:

(a) Eight (8) scheduled working days will be considered the equivalent of ten (10) consecutive working days.

(b) Sixteen (16) scheduled working days will be considered the equivalent of twenty (20) consecutive working days.

(c) Twenty-four (24) scheduled working days will be considered the equivalent of thirty (30) consecutive working days.

The Position of the Parties

LIUNA OPDC

19. LIUNA OPDC's position is that what occurred to the six (6) grievors on November 12, 2010 was not a *bona fide* layoff as there was no shortage of work. It asserts the evidence clearly shows that, if there had been supervision, there was plenty of work for these labourers to do. It asserts the employer created the lack of supervision situation and it had various options available to it to ensure these six (6) individuals did not suffer financially.

20. LIUNA OPDC cited and relied on the following cases for the proposition that just because people are off work that fact does not equate to there being a layoff: (*Pro Insul Ltd. and International Association of Heat and Frost Insulators and Asbestos Workers, Local 110*, (2000) 88 L.A.C. (4th) 397; *Spantec Constructors Ltd. and International Union of Operating Engineers, Local 955*, (1994) 51 L.A.C. (4th) 267; *Burvic Holdings Ltd. and Office and Technical Employees Union, Local 15*, (1998) 73 L.A.C. (4th) 147; and *Dresden Industrial Co. and United Food and Commercial Workers' Union, Locals 175 & 633*, (2004) 126 L.A.C. (4th) 61).

21. *Pro Insul Ltd., supra*, is an arbitration decision from Alberta that found, absent a seniority provision, the employer had the unrestricted right to retain employees constituting best crew. In argument, LIUNA OPDC referred the Board to the following passage from this decision at page 405:

> In our view, the word "layoff" in this Collective Agreement means the termination of employment in response to a reduction in the Employer's manning requirements, i.e. in response to a shortage of work. This is something different from a termination without cause on notice where the work is ongoing and the employee will be replaced by another.
>
> We agree with this interpretation of "layoff".

22. The union referred the Board to page 275 of the *Spantec Constructors Ltd.*, decision, *supra*, for the following quote from arbitrator Weatherhill in his *Northern Electric Co.* (1971), 23 L.A.C. 104 decision:

> All persons who are laid off are off work, but not all persons who are off work have been laid off ... The definition of lay-off as "a period of being off work" may not have caused any difficulties in the cases above referred to, but it should be clear that it is not at all a precise or sufficient definition for most cases.
>
> In my view, "lay-off" involves temporary severance of the employment relationship (in the narrow, technical sense of that phrase) for the purpose of reducing the employment force in order to meet the manning requirements of the employer. On this definition, a lock-out is not a lay-off... *nor is a disciplinary suspension* ... [emphasis in original]
>
> In our view the word "lay-off" in this collective agreement means the termination of employment in response to a reduction in the employer's manning requirements, *i.e.*, in response to a shortage of work."

23. *Burvic Holdings Ltd.*, *supra*, is another decision relied on to assist in defining the word lay-off. In this case, the arbitrator found that the closure of a medical clinic for three (3) days in order to protest government funding decisions was not a lay-off but rather was a suspension of operations. At page 159 of the decision the arbitrator stated the following:

> The reasoning in both those decisions reflects the view that for there to be layoff, absent a collective agreement definition to the contrary, it is generally accepted that there must be a decrease in the work requirements of the employer and a period of time when employees are off work because of that decrease.
>
> While the matter is not an easy one, I believe the better view in all the circumstances of this case is that what occurred was not a lay-off. In reaching this conclusion I have relied upon the reasoning in *Re Ferguson Industries, supra,* and *Re Northern Electric, supra,* which illustrate the general assumption of many arbitrators that a layoff involves suspending the services of employees because of a lack of available work.

24. *Dresden Industrial Co., supra*, was relied upon by LIUNA OPDC for the proposition that there is a presumption of layoff if there is an involuntary separation from active employment triggered by operational requirements. At pages 73-74 of the decision, the arbitrator stated the following:

Turning to the arbitral jurisprudence that the parties have cited, a number of relevant principles are expressed in these cases pertaining to vacation shutdowns, lay-offs, operational efficiency and seniority. They are worth restating in an organized and summary fashion:

1. The relationship between the operational efficiency rights of the employer and the seniority rights of the employees must be understood within the context of the actual language of the collective agreement. The reader of the collective agreement is to strive to reconcile the two sets of rights where the language calls for balancing. However, where primacy to one interest over the other is provided, the allocation of rights must be allocated according to the actual weight of the language employed by the parties. *Fleet Industries Ltd., supra; Colonial Cookies, supra; Hotel-Dieu Grace Hospital, supra.*

2. Management's right to schedule work and organize production cannot be used as a guise for avoiding the seniority requirements of the collective agreement. *Beaver Wood Fibre Co., supra; Re E.S. & A. Robinson (Canada) Ltd. and Printing Specialties & Paper Products Union, Loc. 466* (1976), 11 L.A.C. (2d) 408 (Swan).

3. Employers can require employees to take their vacation according to its needs, including during a shutdown, where: (i) the collective agreement expressly permits it; (ii) the collective agreement allows for "operational requirement" to be the primary guiding factor in vacation scheduling. *Fleet Industries Ltd., supra, Ottawa Hospital, supra; Sifto Canada Inc., supra.*

4. Employees are entitled to be treated equitably according to their length of service, unless the collective agreement specifically permits differential treatment otherwise valid in law. *Ottawa Hospital, supra; Beaver Wood Fibre Co., supra, Re United Tire & Rubber Mfg. (Toronto) Ltd., supra.*

5. Unless the collective agreement expressly states otherwise, the reasons why the employer initiated a production cessation, including a shutdown or a lay-off, are immaterial to determining the respective rights of the employer and the employee. *Jamesway Incubator Co., supra.*

6. In circumstances where employees enjoy seniority rights, where they are capable of continuing to work, where they are involuntarily not at work as a result of the employer's operational reasons (including mandatory vacation shutdown periods), *and* where productive work is continuing at the work site, then the presumption arises that seniority bumping rights apply, unless the specific language of the collective agreement dictates otherwise, *Ottawa Hospital, supra; Colonial Cookies, supra.*

25. If what occurred on November 12, 2010 is not a layoff, as there was no shortage of work, then LIUNA OPDC asserts that the six (6) individuals must have been suspended for one day without pay and without just cause. Likewise, LIUNA asserts that if what transpired is not a layoff then it also cannot be a standoff.

26. In the alternative, should the Board find that the events of November 12, 2010 can be properly characterized as a layoff, then LIUNA OPDC argues that the employer has breached the Collective Agreement, as it did not properly follow the layoff provisions of the Collective Agreement and allow eligible and more senior labourers their right to bump junior labourers who continued to work on November 12th. In this regard, Article 12 of the Collective Agreement states "shall layoff the last employee hired", thus clearly showing the parties have a seniority system when it comes to layoff. If what occurred was a layoff, LIUNA OPDC also points to Articles 15.02(b) and (d), as further evidence that the employer did not comply with the Collective Agreement.

27. LIUNA OPDC asserts that Article 22 of the Collective Agreement is not applicable to the facts of this case. In this regard, it argues that the language of Article 22.01 is clear that: "Standoff is not intended to circumvent the layoff procedure." As such, standoff does not override the other layoff provisions of the Collective Agreement, such as a senior employee's right to bump. Further, it is asserted that the concept of standoff is not applicable to the facts at hand. The evidence does not disclose that the six (6) employees were "unable to proceed" with their work. In fact, it is argued there was no shortage of work. The current fact scenario also does not fit within the language of Article 17.03 which deals only with shutdowns, when work is available, if there is an emergency situation and there is possible loss of life. LIUNA OPDC argues that standoff was intended by the parties to deal with employees who could not work due to road conditions in the spring or when something unexpected happens. It reflects an intention of wanting to keep crews together until unexpected circumstances resolve. In this regard, it is asserted that there are no unexpected circumstances, in fact, the employer created the circumstances. Further, to be able to come within standoff provisions, it is asserted the employer needs to show no other work was available.

Position of HONI

28. HONI argues that the union is attempting to put forward a very narrow definition of layoff by equating it only to a shortage of work. In this regard, HONI referred the Board to the Ontario Divisional Court decision in *Falconbridge Nickel Mines Ltd. and Brunner et al.,* (1980) 28 O.R. (2d) 777 in which the Court found the term lay-off is a flexible word which can reasonably bear several different meanings.

29. HONI also cited the decision in *Jamesway Incubator Co. and Glass, Molders, Pottery, Plastics and Allied Workers International Union, Local 108,* 119 L.A.C. (4th) 369, and referred the Board to the following passage from pages 6 and 7 of that decision:

> In the oft-quoted case of *Re Northern Electric Co. and U.A.W., Loc 1525* (1971), 23 L.A.C. 104 (Weatherill), Arbitrator Weatherill undertook a thorough appraisal of the case law and a thoughtful analysis of the characteristics of a lay-off. He noted that: "All persons who are laid off are off work, but not all persons who are off work have been laid off. The term 'lay-off' is sometimes used in a rather colloquial way to refer to a person who has been suspended, or even discharged, but obviously those are not circumstances in which the seniority provisions of a collective agreement could be said to come into play" [p. 107]. He reasoned further that sometimes the simple definition of a "lay-off" as being "a period of being off work" will suffice in the context of a specific collective agreement and a specific set of facts, but he found that that was not at all a precise or

sufficient definition for most cases. He recognized that a lay-off may include a period of less than one shift. Arbitrator Weatherill concluded his analysis with the oft-quoted definition at p. 107:

> In my view, "lay-off" involves a temporary severance of the employment relationship (in the narrow, technical sense of that phrase) for the purpose of reducing the employment force in order to meet the manning requirements of the employer. On this definition, a lock-out is not a lay-off (and in this respect Publishers Ass'n of New York City (1966), 46 L.A. 388 (Moskowitz) may be distinguished), nor is a disciplinary suspension, nor any absence brought about by the decision of an employee or a trade union. While the temporary severance of all employees would come within this definition, such a severance might not involve the seniority provisions of a collective agreement, since there would remain no jobs to be claimed …
>
> Consistent with the above definition is the notion that a lay-off is a method of reduction of the working force.

Arbitrator Weatherill also found that the reason or circumstances which led to the determination to reduce the number of employees was immaterial to the question of whether or not a lay-off was occurring.

30. As it concerns the *Dresden, supra,* decision relied on by the union in its argument, HONI asserts the facts in this case fall within the enumerated general principle #5 from that decision, namely:

> 5. Unless the collective agreement expressly states otherwise, the reasons why the employer initiated a production cessation, including a shutdown or a layoff, are immaterial to determining the respective rights of the employer and the employee. *Jamesway Incubator Co., supra.*

31. As it concerns the use of article 22, the standoff provisions in the Collective Agreement, HONI argues that standoff is not a defined term and can be viewed as a type of layoff. In fact, it is a time limited layoff of short duration which does not trigger the same protections you may have in a longer term layoff situation (i.e. bumping rights). In this regard, HONI relied upon the Board's decision in *Re EPSCA, Ontario Hydro,* (1991) OLRD No. 85 (QL) (January 28, 1991). In this decision the Board interpreted the standoff provisions found in the EPSCA and Ontario Allied Construction Trades Council agreement in relation to a grievance involving the standoff of an operating engineer who was also a union steward. The standoff language in article 22.1 of that earlier agreement is set out at paragraph 5 of the decision as follows:

> 22.1 When unable to proceed with his work, an REV Employer may elect to either layoff or standoff part or all of his crew. The parties agree standoff is not intended to circumvent the layoff procedure.

(a) Layoff

If the Employer elects layoff, it shall be carried out in accordance with the terms of the layoff/seniority provisions of the appropriate Trade Appendix of this Agreement. An employee laid off will be issued a Record of Employment Form indicating "Layoff - shortage of work".

REV (b) Standoff

If the Employer elects standoff, It reserves the right to standoff its employees without pay up to a maximum of five (5) consecutive working days. Notification of standoff will be made by the employer during normal working hours. No travel allowance will be paid to an employee for the standoff period.

22.2 An employee who qualifies for REV subsistence allowance and who is placed on standoff will be paid subsistence allowance up to a maximum of five (5) consecutive working days.

22.3 If standoff continues beyond five (5) REV consecutive working days, an employee, at his option, may elect to remain on or be removed from standoff. Subsistence allowance will cease after five (5) consecutive working days on standoff.

22.4 Standoff shall only continue beyond NEW fifteen (15) days with the mutual consent of the Employer and the Union in writing.

22.5 An employee who elects to remain on REV standoff beyond five (5) days shall be Issued a Record of Employment Form indicating "Standoff - lack of work" dating back to his first day on standoff. The Employer retains recall rights on employees electing to continue on standoff.

22.6 If an employee elects layoff beyond the REV fifth day it shall be carried out in accordance with the terms of the layoff/seniority provisions of the appropriate Trade Appendix of this Agreement. An employee laid off will be issued a Record of Employment Form indicating "Layoff -shortage of work" dating back to his first day on standoff. The Employer does not retain recall rights if the employee elects layoff.

32. At paragraphs 8 and 9 of the *EPSCA, Ontario Hydro decision, supra*, the Board made the following comments concerning the standoff language found in that agreement:

> 8. In Article 22, the parties have agreed that the respondent shall have the right to elect to either layoff or standoff employees. Although it can be said, as the applicant argued, that standoff is a kind of layoff; it is evident that the parties have differentiated between the two terms. Article 22 specifically provides that if the respondent elects to lay off employees, it must follow the procedure therefore established in the collective agreement. On the other hand, the respondent can elect to standoff an employee for up to five consecutive working days. If the standoff continues beyond five consecutive working days, the employee has the option to remain on or be removed from standoff. (If the employee elects to be removed from standoff and there is

> still a shortage of work, s/he can presumably be laid off, in accordance with any applicable layoff provisions, such as, for example, Article 8). An employee can be stoodoff beyond fifteen days only upon written agreement of the respondent and the employees' union. Article 22 provides no special status to stewards in standoff situations.
>
> 9. Article 22 is designed to give the respondent some additional flexibility in short term work shortage situations. In doing so, it provides an exception to the rule established in Article 8 that stewards shall be the last employees affected by shortages of work. It makes labour relations sense to give stewards special protection in layoff situations as the parties have chosen to do in Article 8. The parties could have given stewards the same protection in the standoff situations contemplated by Article 22, but they have not done so.

33. HONI argues that the language of article 22 in the current Collective Agreement is very similar to the language that was interpreted by the Board in the agreement with the Ontario Allied Construction Trades Council. Further, the current language of article 22 does not support the union's interpretation that standoff is restricted only to spring weather situations or the like. The phrase "when unable to proceed", which starts the first paragraph of Article 22.01 does not identify or restrict the basis as to why the employer is unable to proceed with work. The language of Article 22 is not so specific so as to create a clear restriction on the use of standoff in the given circumstances of this matter.

34. HONI asserts that Young, in his managerial discretion, made a bona fide operational decision to schedule an all Foremen's Meeting, on November 12, 2010. There is no evidence to suggest its purpose or goals were anything other than legitimate. Unfortunately, the lack of proper and sufficient supervision for all of the crews resulted. As a consequence, Gilbert made the bona fide operational decision to standoff two (2) crews, comprised of the six (6) individual grievors. For various reasons, including travel distance, orientation time and their associated costs, Gilbert made the decision that the employer was unable to proceed with the work of those two crews for that one day. The language of Article 22 does not indicate any restriction as to the grounds why there is the inability to have work done. Further, there is nothing in the Collective Agreement that obligates the employer to bring in foremen or subforemen from the union hiring hall or transfer them from Stations to Lines. Likewise, there is no obligation in the Collective Agreement that, in order to avoid a lay off or standoff, the employer must transfer a qualified subforeman 160 km and bring him to the site for orientation the day before. Nor is there an obligation that requires the employer to overstaff remaining crew complement in order to avoid a layoff/standoff. HONI asserts there is nothing in the Collective Agreement that restricts Gilbert making the assessment which he believed made the most economic sense for the employer. Gilbert made a bona fide and legitimate management decision that the best way to proceed, that also made the most operational sense, was to standoff these two (2) crews for one day.

35. HONI also argued that it is the union's onus to convince the Board that article 22, even if there was some ambiguity, supports the union's interpretation that the language referring to standoff not circumventing the layoff procedure means that employees have the ability to bump. For this proposition HONI cited the following cases: *Re Wire Rope Industries Ltd.*, (1982) 4 L.A.C. (3d) 323 (M. I. Chertkow) and *British Columbia Hydro & Power Authority*, [1987] 6 C.L.A.S. 44 (H. Allan Hope, Q.C.).

Legal Analysis and Decision

36. This referral requires the Board to analyze and interpret the language of the Collective Agreement. In this regard, the Board in previous decisions has made the following relevant comments with which we agree and adopt:

> 14. The Board is thus required to analyze and interpret the language of the collective agreement. A collective agreement is a contract. As described in *Canadian Labour Arbitration Third Edition* (D.J.M. Brown and D.M. Beatty, Aurora: Canada Law Book, 2003) at p. 4-42, an arbitration tribunal's task in interpreting a collective agreement is no different than that faced by other adjudicators in applying statutes, private contracts and other authoritative directives. The general principle for interpreting contracts is that the tribunal should "search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract": *Consolidated-Bathurst Export Ltd.* v. *Mutual Boiler & Machinery Ins. Co.,* (1979), 112 D.L.R. (3d) 49 (S.C.C.) at p. 58; see also *Hillis Oil & Sales Ltd.* v. *Wynn's Canada Ltd.,* [1986] 1 S.C.R. 57. *Hamilton and District Sheet Metal Contractors Inc.,* [1981] OLRB Rep. June 672, *The Corporation of the City of Sault Ste. Marie,* [1994] OLRB Rep. April 496. The contract should be construed as a whole, giving effect to all of its terms, so long as this does not result in an absurdity: *Holt* v. *Corporation of the City of Thunder Bay,* (2003) 65 O.R. (3d) 257 (C.A.) at p. 263. *Belleville Police Services Board* (2000), 91 L.A.C. (4th) 99 (Goodfellow). The contract must also be interpreted with a view to the labour relations considerations involved, and in particular, the practical realities of the construction industry: *Provincial International Cranes Inc.,* [1998] OLRB Rep. Nov./Dec. 1004.
>
> (see *Bruce Power LP*, [2004] OLRB Rep. May/June 479, paragraph 14).

37. After carefully reviewing the authorities provided by the parties, and the language of the Collective Agreement, the Board is of the opinion that the employer had the ability to use article 22, the Standoff provisions of the Collective Agreement. The Board agrees with the employer's position that the term standoff has not been defined by the parties in the Collective Agreement. Further, the Board also agrees the current language of Article 22 of the Collective Agreement is very similar to the standoff language interpreted by the Board in its prior decision in the *EPSCA, Ontario Hydro, supra.* The Board finds that the current language of article 22 still supports an interpretation that the concept of standoff is a type of layoff but that the parties have differentiated between the two terms. The Board agrees with the reasoning from the prior *EPSCA, Ontario Hydro decision, supra,* decision, and finds that standoff is a time limited layoff of short duration that does not trigger the bumping rights that would otherwise be associated with a longer term layoff. This interpretation that standoff is a type of layoff is also consistent with many of the layoff definitions discussed in the arbitral authorities referred to by the parties. In particular, arbitrator Weatherill in *Northern Electric Co., supra,* commented a "layoff involves a temporary severance of the employment relationship (in the narrow, technical sense of that phrase) for the purpose of reducing the employment force in order to meet the manning requirements of the employer". As such, the language of article 22 states that a Record of Employment ("ROE") is to issue electronically upon the commencement of standoff. The issuance of an ROE demonstrates, in the narrow and technical sense, that some sort of severance of the employment relationship is occurring and hence, qualifies as a type of layoff. Also,

Arbitrator Weatherill commented that the reason or circumstance which led to the determination to reduce the number of employees should be immaterial to the question of whether or not a layoff has occurred. In this regard, the fact that an all Foreman's Meeting led to the determination to reduce the number of employees working should be immaterial to the question of whether or not there is a layoff.

38. The Board finds the following sentence found in article 22.01, "The parties agree Standoff is not intended to circumvent the layoff procedure", when read in light of the language of article 22.03 and 22.04, demonstrates the parties intended to provide the employer with some additional flexibility in short term situations when work is unable to proceed. In doing so, the parties have agreed the employer may elect to standoff part or all of a crew. If standoff continues beyond ten consecutive working days, and the employee then elects layoff, then it shall be carried out in accordance with the terms of the layoff/seniority provisions of the Collective Agreement.

39. The above interpretation is consistent with LIUNA OPDC's position that standoff reflects an intention to keep crews together until circumstances resolve themselves. This recognition that standoff reflects an intention to keep crews together in the short term, would be defeated if the union's interpretation that standoff does not circumvent the right of a senior employee to bump a junior employee in a standoff scenario that is to last only one, two or up to ten days. The Board finds the phrase "standoff is not intended to circumvent the layoff procedure", when read in light of the remaining provisions of article 22, reflects the parties' intention to restrict the employer from engaging in "mischief" or the potential "misuse" of standoff, in order to avoid triggering a layoff. For example, if the employer stoodoff someone for three consecutive periods of five (5) working days each, (i.e. fifteen (15) working days, in total), an employer would not be able to circumvent the layoff procedure by characterizing it as three separate periods of standoff. Rather, the language of article 22 and article 8 of the Collective Agreement would operate such that, an employee in this scenario, would have the option to elect layoff beyond the tenth consecutive working day on standoff and, if layoff is elected, the employee would be able to exercise his/her seniority rights.

40. The Board agrees with HONI's position and finds that the language "unable to proceed" with the work does not identify or otherwise restrict the grounds as to why the employer is unable to proceed. The language of article 22.01 is not so specific that it is clear it is only applicable in shortage of work situations or when no other work is available.

41. The Board finds that Young and Gilbert made bona fide operational decisions and exercised their management judgement in a way that is permitted by the language of the Collective Agreement. The Board does not find that the language of the Collective Agreement obligated the employer to pursue and implement the various scheduling/manning alternatives that were advanced by the union in its cross-examination of the witnesses. Gilbert, for the reasons he identified in his testimony, made the operational decision that he was unable to proceed with the two (2) crews and, therefore, he implemented a one day standoff of those two (2) crews. The Board finds that Gilbert made a bona fide and legitimate management decision that standoff was the preferred course of action that made the most operational sense. In this regard, the Board is reluctant to micro-manage the events, with the benefit of hindsight, and suggest that the employer should have manned its crews in a different fashion for that one day. The fact that six (6) employees end up bearing the financial burden of an operational decision not to proceed with work, on a particular day, is not an uncommon situation in the construction industry and is one

that the Board finds was within the contemplation of the parties given the provisions of the Collective Agreement.

42. The Board rejects LIUNA OPDC's position that this was not a bona fide standoff/layoff. Further, the Board also rejects the union's position that what occurred was a one day suspension without pay. The evidence discloses the employer did not proceed by way of discipline and it willingly acknowledged these six (6) employees did nothing wrong. For the reasons already discussed above, the Board finds that the six individuals were not suspended by the employer, but rather, the employer invoked the standoff provisions of the Collective Agreement. In invoking the standoff provisions the Board finds HONI not to have breached the Collective Agreement and, as a result, the Board dismisses the grievance.

3990-10-OH Shlomo Conforti, Applicant v. **Investia Financial Services Inc. and Industrial Alliance Insurance and Financial Services Inc.**, Responding Parties

Discharge – Health and Safety – Practice and Procedure – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

BEFORE: *Brian McLean*, Vice-Chair.

DECISION OF THE BOARD: September 23, 2011

1. By decision dated May 19, 2011 the Board invited submissions from the applicant regarding whether this application made out a violation of s.50 of the *Occupational Health and*

Safety Act, (the "OHSA") on the facts alleged and/or whether given the facts alleged, the application was something the Board should inquire into. The applicant filed submissions in response to the Board's invitation and also requested reconsideration of a decision made on May 19, 2011. The aspect of the May 19, 2011 decision which is the basis of the request for reconsideration is the Board's decision to receive and consider the employer's response to the application despite the fact it was delivered late to the applicant. I will deal first with this issue.

2. The Board's Rules describe the way in which applications and responses are to be delivered and filed and the time within which each must occur. The Rules provide that the response to the application must be "delivered" to the applicant before or at the same time as, the response is filed with the Board. Delivery of a Response is effected when the responding party faxes the response, hand delivers the response, posts the response by regular mail or gives the response to a courier to be delivered. The date a document is delivered is the date that document is received by the other party. A response delivered by regular mail is deemed to be delivered on the fifth day after the document was mailed (see Rule 6.7).

3. In this case the Board eventually set a date for response to the application as April 1, 2011. That was done by way of decision dated March 15, 2011 which said in relevant part: "the timeline for *filing* the response is hereby extended until April 1, 2011" [emphasis added]. The response was received by the Board on that date. Included with the response was a certificate of delivery indicating that the response was "posted by regular mail on April 1, 2011 at 2:00 p.m.". As a result, assuming the certificate of delivery was accurate, the response was "filed" in a timely fashion but possibly not delivered to the applicant on time. The applicant asserted the response was delivered late and asked the Board to note the respondent in default. There was no suggestion there was any prejudice to the applicant as a result of the delay.

4. The decision of the Board which the applicant requests reconsideration is in paragraph 2 which simply states:

> 2. The responding party filed its response with the Board on time but was arguably three days late in delivering its response to the applicant. To the extent necessary, the Board extends the time for the response to be delivered so that it is timely.

5. The Board's practice is to be quite lenient with certain time limits where no prejudice is alleged and where time is not of the essence. In this regard, Rule 3.2 provides a broad discretion and permits the Board to extend or abridge time limits as the Board considers advisable. I note that in this case the labour relations officer was to report back to the Board regarding settlement efforts by April 15, 2011, so any hearing of the application would not be delayed by the late delivery of the response. Accordingly, the Board did what it normally does in situations where there may be disputes about delivery. It raised the issue of a possible failure to make delivery on time and extended the time for filing the response. I note that it is only a possible failure to make delivery on time because the Board's March 15, 2011 decision only set a deadline for "filing" the response and set no deadline for delivery. The purpose of that aspect of the May 19, 2011 decision was to get past the delivery issue and on to the merits of this case.

6. Therefore, the applicant's suggestion that the Board in its decision "maliciously implies that the Applicant is lying" is wrong. The response was likely not "delivered" on time within the meaning of the Board's Rules, but there may have been an issue about whether the

Board's March 15, 2011 decision was complied with. The Board recognized that this was simply not an issue worth a dispute so the time was extended if it was necessary to do so. The use of the word "arguably" in the decision is simply a device to avoid making a specific finding of fact where the Board has not received evidence or argument. It suggested nothing about the applicant. That decision was correct.

7. The applicant also questions the Board's omission of section 50(2) of the OHSA in the recitation of the relevant statutory provisions in the decision. He states:

> In my humble opinion, the Vice-Chair was not trying to save paper, but simply trying to eliminate from the untrained eyes of the Applicant the fact that in filing a complaint I'm fulfilling my rights under the law in the proper, prescribed way. In my eyes this is a malicious and prejudiced omission intended to obfuscate the Applicant, who is not represented or assisted by any lawyer.

8. Section 50(2) of the OHSA simply states that an employee may elect to have a complaint alleging a violation of section 50(1) dealt with by an arbitrator under a collective agreement (if the employee is represented by a union) or by the Board. Since this is an application made to the Board and the applicant is not unionized it was omitted as irrelevant.

9. I turn next to the issues which caused me to issue the May 19, 2011 decision: whether the application discloses a breach of the OHSA on its face and, if it does, whether the Board should inquire into the application.

10. With respect to the first issue, it is not at all clear that the conduct complained of here – being discharged for making a harassment complaint – is a violation of the OHSA. In this regard, the Board must find its jurisdiction with respect to an application in the legislation, in this case the OHSA. The Board's authority to deal with a matter under s.50 of the OHSA arises when a worker complains that he or she has been subject to dismissal or discipline, threat of dismissal or discipline, intimidated or threatened or coerced by employer's because the worker has "acted in compliance with the Act"; when a worker has given evidence, or when a worker "has sought the enforcement of the Act or regulations". The Board cannot take jurisdiction over something unless the OHSA or another piece of legislation says it can. Section 50 of the OHSA tells the Board when it can take jurisdiction over health and safety reprisal complaints. There are three bases upon which the Board can take jurisdiction under section 50 of the OHSA: - when a worker has "acted in compliance with the Act"; when a worker has "given evidence"; or when a worker "has sought the enforcement" of the Act or the regulations. In my view, the latter basis is the only one that applies in the "typical" harassment complaint situation as in this case.

11. In this regard, section 32.0.1(b) of the OHSA requires an employer to create a policy with respect to workplace harassment. Sections 32.0.6 and 32.0.7 of the OHSA require an employer to develop and maintain a program to implement the policy with respect to workplace harassment, and to provide a worker with information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment. The Applicant makes no allegations that the Respondent has not fulfilled these obligations or that he was discharged for seeking to enforce these provisions of the OHSA.

12. The OHSA provides no further duties or obligations with respect to workplace harassment. Harassment and workplace violence provisions were only recently added to the OHSA. The language of the new amendments to the OHSA appears to specifically omit an obligation to prevent workplace harassment from further duties and obligations where new obligations were created with respect to workplace violence issues:

> (a) Section 32.0.3, which addresses the requirement for a risk assessment in respect of workplace violence, states in subsection (4): "An employer shall reassess the risks of workplace violence as often as is necessary to ensure that the related policy under clause 32.0.1 (1) (a) and the related program under subsection 32.0.2 (1) continue to protect workers from workplace violence."
>
> (b) Section 32.0.5(1) states: "For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence."
>
> (c) Section 43, which addresses the right of a worker to refuse unsafe work, states at subsection (3)(b.1): "A worker may refuse to work or do particular work where he or she has reason to believe that, (b. 1) workplace violence is likely to endanger himself or herself."

13. Therefore, it appears the OHSA only requires an employer to put a workplace harassment policy and program in place and to provide a worker with information and instruction as appropriate. The OHSA does not provide any further requirements and, in particular, does not provide that the duties under ss. 25, 27, and 28 apply with respect to workplace harassment. Further, the OHSA provides no specific rights to a worker with respect to workplace harassment.

14. To look at it another way, the OHSA specifically gives the Board the power to enquire into the situation where an employee is fired for complaining about a missing guard on a machine but does not specifically give the Board the power to enquire into the situation where an employee is fired for complaining about harassment. In the case of an employee who claims that the workplace is unsafe because a machine is lacking a guard, the employee is, when complaining, seeking to force the employer to comply with the statutory obligation to ensure protective devices as prescribed in the Act are provided (section 25(1)(a)) or take every precaution reasonable in the circumstances for the protection of a worker (section 25(2)(h)).

15. In the case of an employee who complains that he has been harassed, there is no provision in the OHSA that says an employer has an obligation to keep the workplace harassment free. The only obligation set out in the Act is that an employer have a policy for dealing with harassment complaints. The legislature could very easily have said an employer has an obligation to provide a harassment free workplace but it did not.

16. If the employer simply ignores its obligations and doesn't create a policy, and a worker asks the employer to do so, and the employer penalizes the worker, then that worker can apply to the Board under section 50 on the basis that he was seeking enforcement under the Act. He or she seeks enforcement of the Act by asking the employer to comply with its obligation. In response to that request, the employee was penalized. A similar argument can be made for the worker who points out to the employer that a specified portion of the statutory requirement has

been omitted. If, for example, an employer's policy had no measures and procedures for workers to report incidents of workplace harassment to the employer, and an employee was fired by insisting that the policy be changed to accord with the Act, that person can apply under section 50 on the same basis.

17. What it appears the Board does not have the authority to do is to adjudicate upon the practical application of a policy that otherwise complies with the Act. If an individual complains under an employer's workplace harassment policy and doesn't like the way the employer handled the investigation (i.e. it didn't interview anyone), and then that person complains to the employer about its poor investigation and is fired, the Board appears not to have the authority under section 50 to deal with that situation. The discharge is not a reprisal as defined under section 50, because the Act does not dictate how an employer will actually investigate a harassment complaint and protect a worker who complains about that practical task not being performed properly. The Act just does not give us the authority to deal with this situation.

18. The issue comes back to the rules of delegated statutory power. The Board only has the ability to adjudicate on matters that the Legislature, through the Act, tells us we have the authority to adjudicate upon and all powers which are practically necessary for the accomplishment of the statutory objective. Our authority to deal with reprisal complaints is set out in section 50 of the Act. With respect to the new harassment provisions, the Board's authority appears very limited. The Legislature could have very clearly opened up the Board's authority beyond what is there, but it chose not to. The Board has no power to decide otherwise. Individuals who find themselves in situations that the Board cannot remedy will usually have other options, via a grievance or a court action. But if for some reason they don't, the Board does not have the authority to create some free-standing jurisdiction in order to help them.

19. The history of harassment as a health and safety issue also supports this conclusion. Prior to Bill 168 (the Bill which brought the workplace violence and harassment sections into the OHSA), the Board frequently found that there was no protection in the OHSA for workplace harassment, or at least that the Board should not inquire into such complaints. (See *Meridian Magnesium* [1996] OLRB Rep. Nov/Dec 964, *Centro Donne Inc.* [1997] O.L.R.D. No. 309, and *Amdahl Canada 2000* CanLII 11966. *Ten Star Financial Services* 2009 CanLII 28174).

20. Given that history, in my view the Legislature would have been much more clear had it intended to make complaining about harassment a protected right under the Act. This is especially true given the fact that such an interpretation would likely significantly increase the Board's caseload.

21. However, it is unnecessary for me to determine in this case whether the Board has jurisdiction over alleged reprisal for harassment complaints. That is because if the Board does have jurisdiction over this kind of complaint, the Board ought to carefully scrutinize applications at the outset. The risk is that the Board's resources will be overwhelmed by employee complaints arising out of routine disciplinary matters. This is just such a case. It is not a case the Board should exercise its discretion to inquire with having regard to s.50(3).

22. In the decision dated May 19, 2011 I raised the proposition that the behaviour on which the applicant complains might not constitute "harassment". The OHSA defines workplace

harassment as meaning "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome".

23. In the May 19, 2011 decision I noted there were one or two emails (the first of which was dated January 18, 2011) which appeared on their face to be simply employees doing their jobs in ensuring that the applicant complied with the employer's rules. The applicant took issue with my assessment in his submissions. He asserts the "harassment had been going already; this was just the peak that totally exasperated me, and was truly driving me into desperation". This assertion is difficult to reconcile with the application. In the application the applicant wrote "The harassment and provocative bullying *started* from Ms. Simone Maynard (please see attached e-mail dated Jan.18th 2011..." [emphasis added]. The applicant then goes on to generally describe the sequence of events that were set out in the Board's decision dated May 19, 2011. To the extent the applicant alleges there was "harassment" prior to this time, it is an entirely new allegation, it is not pleaded in the way required by the Board's Rules and is at odds with the statement made in the application.

24. It is worth repeating the facts at this point:

> ...
>
> 4. The basic facts do not appear to be in dispute. The applicant was employed (or engaged as an independent contractor) by the responding party, Investia Financial Services Inc. ("Investia").
>
> 5. There appears to be some disputes concerning work practices between the applicant and another employee Simone. The applicant believes the other employee's e-mail constituted harassment. The dispute began when the other employee wrote to the applicant as follows:
>
> > Hi Shlomo,
> >
> > Please be reminded that the NCAAF for this plan is not in good order and the restriction has not been removed. The trade below will be permitted as I understand that you met with the clients last week and have explained why the NCAAF is not in good order.
> >
> > Please note that in order to have the trade restriction removed, the deficiencies noted must be corrected.
> >
> > Thanks,
> > Simone
>
> 6. The applicant replied as follows:
>
> > Simone,
> >
> > As I mentioned before the client WAS GIVEN THE RISK OF BORROWING, LEVERAGE and COMPLAINTS forms and disclosures.

> Please remove IMMEDIATELY all restrictions for transactions with this client. Otherwise, please escalate this situation immediately to the President of Investia, so that a decision may be made if I'm forced to leave Investia due to not being allowed to operate normally.
> Thank you.
> Shlomo Conforti, 7599-C3480

7. The applicant complained about Simone to his superiors:

> Sorry to bother you again, but the harassment of Simone is exasperating, and I can not continue to work this way.
>
> Today I was trying to do transactions for two other clients, …, and in both instances there was a Stop Trade Plan Watch obstruction, imposed by Simone, just as in yesterday's case of the client …, for what must be the same reasons. Both these clients KYC were done, discussed and misunderstandings resolved through you John, with Simone.
>
> Please resolve once and for all this untenable situation, or, alternatively, as I suggested, let us discuss with Louis my separation from Investia due to harassment and not being allowed to operate normally.
>
> Thank you for your immediate attention to this matter.
>
> Shlomo Conforti,

8. Management communicated to the applicant about the technical issue involved. The applicant asserts that management did nothing about the "harassment and provocative bullying," however. The applicant believed a resolution was reached in a way which included Simone no longer communicating with the applicant.

9. However, the next day a different employee, Debbie, wrote to the applicant about a different issue as follows:

> As per weekly advisor communications dated September 09, 2010 - the deposit batch must be closed everyday and faxed with the deposit slip to Investia.
>
> We would like to remind you that deposits must be closed every day in Univeris. Deposit slips and daily reports should only include the day's trading activity. Any differences must be accounted for directly on the report in order to facilitate our account reconciliation process. In addition, all cheques for each day's purchases must be deposited at the bank on the same day.
>
> We kindly request that you fax your daily deposit reports and stamped bank slips or ATM slips to Head Office

10. The applicant considered the e-mail further harassment and responded as follows:

> Debbie,
> I closed this batch already, on Jan 17th. Please see attached image copy. This was faxed to your Processing … number as required. Proof of this faxing is available.
> Please explain back to me, as soon as possible, why you are asking me for this, and who/what prompted you to do so. Also please clarify to me in which department of Investia do you work, in what capacity and what is your role, as I do not understand this situation.
> Thank you. I'm looking forward to your prompt and clear reply with answers to all my questions.
> Best regards,
> Shlomo

11. Investia's Manager of Customer Service, Guiseppe Nocera, wrote to the applicant regarding what had occurred:

> Good afternoon Shlomo,
>
> Debbie my employee came to me with the following e-mail from you. I think I'm in a better position to provide you with answers to your question.
>
> Every morning, in Client Services, we have a report where it is indicated all the Branches who did not close their batches the previous day. My Team has the responsibility to send a reminder to these Branches to close their batch and to fax or e-mail to us the supporting documents. You have received the following reminder for a batch you did generate but you did not click on the next button which says "process" so you batch was still opened. Once you click "process" it will give you a confirmation and there should be a number which you don't have on the attached report. Also, there is no proof of deposit attached to this report so it is not valid for our trust accounting. If you still continue to do it this way, you will show up in our daily report and you will be receiving regular reminders from my Team.
>
> Also, next time you have an issue, please ask for a Supervisor. This is a request from Head Office. I found the tone of your message very abusive and offensive for an employee just doing her job. I don't think I will accept this kind of attitude in the future.
>
> Best regards,
>
> Giuseppe

12. In reply the applicant wrote to the manager as follows:

> Dear Mr. Nocera,
>
> I actually am not reading all details of your letter, but in the present, never mind the future, I am positively and completely sure, without any doubt or any lack of conviction, that I am not, and will not, accept your attitude. So, you can take your time until the future will catch up with you and my attitude, and in the mean time I'm dismissing you, and your attitude, as simply irrelevant and of no consequence. And, by the way, young Mr. Nocera, in case you don't know it yet, you should not abusively and possessively refer to a worker as "my employee", that is offensive, demeaning and belittling language, she is" not yours at all "!!! You are simply incompetent. End of paragraph.
>
> Yours sincerely,
> Shlomo Conforti (Mr.)

13. Mr. Nocera responded as follows:

> No comment. As I'm incompetent, the top Management will be taking care of this.

14. Finally, the applicant wrote back to Mr. Nocera:

> Excellent! You made my day Recognition of one's own incompetence is the start of realizing one has reached the limit of his own capabilities!
> And by the way, neither Debbie nor anyone else is "Your employee ", in spite of you have reached the limit of your incompetence, as you don't pay her a cent of your own money for her hard work, she simply, and unfortunately, reports to you as a fellow worker, she is an " Investia " employee" which pays her for her work, and pays you, without any good reason, for your incompetent" attitude".
> I'm looking forward to discuss this matter with Investia's President. And the matter of who and why you are copying in your" attitude e-mails".
> In the mean time, go back to your little corner of incompetence, while we, the Financial Advisors that Investia works with us, create the business that provides the money we pay Investia, so that Investia can pay some employees like Debbie, to work with us, and some incompetents like you, to sit and do damage, harass and abuse those who provide you with the means to make a living.
> As I said before, you are irrelevant and of no consequence. Back to your little corner. End of concluding paragraph.

15. The applicant's emails were sent to upper management, the Assistant Chief Compliance Officer for Investia. He wrote to the applicant as follows:

> Mr. Conforti, please govern yourself accordingly as your continued verbal bashing of the Investia staff, who are here to assist you is absolutely unacceptable and will not be tolerated. I assure you, the people copied on this email are relevant.
>
> Giuseppe and Simone, I'm sorry you have to put up with this non-sense.
>
> John, I look forward to addressing this today during our conference call.
>
> Regards,
>
> Cas Litwin I Assistant Chief Compliance Officer

16. The applicant responded as follows:

> "I'm looking forward to further analyze your "non-sense "comments about relevance in discussions about the harassment and abuse that I" have been submitted to. I had requested previously to discuss this harassment with the President of Investia, which I'm looking forward to do. In the mean time , I would suggest you find advise from competent people about governing your language skills so they may become, hopefully in the not too distant future, more acceptable and ,perhaps, even tolerable. I wish you have some time to prepare your communication skills in preparation to your conference call. If you need any assistance from me, please feel free to ask for it, we Financial Advisors are here to support you in becoming more competent. I'm really sorry, and profoundly regret, having had to put up with your non-sense. Comments ? Call me any time, no need for conference calls, I'm not incompetent like others."

...

25. I do not accept that the two emails sent to the applicant by two different compliance employees amounted to a "course of vexatious comment or conduct" against the applicant. Nor is there any possibility - based on the materials filed with the application – that the compliance employees knew or ought to have known that the comments were unwelcome. Harassment is not the same as an employer (or employees responsible for ensuring that other employees comply with rules and regulations) ensuring that rules are complied with. No person acting reasonably could have thought the two emails amounted to harassment. And thereafter, the employer's conduct amounted to simply dealing with the applicant's behaviour.

26. Nothing in the submissions affects my concern expressed in the May 9, 2011 decision regarding whether this application is one that the Board should inquire into. The applicant's employment was terminated by notice given February 16, 2011. There is no doubt that it occurred almost immediately after the applicant, by letter dated February 14, 2011, requested that the responding party investigate his harassment complaint. There is no doubt (assuming, that harassment complaints are protected activity under the OHSA) that termination of employment following so closely on the heels of a complaint would normally cause the Board significant

concern. However, close review of the materials filed, and despite the reverse onus provisions contained in section 50(5) of the OHSA, eliminates the concern.

27. There is no dispute that on February 8, 2011 the applicant was advised that his communications were "less than professional, specifically belligerent and derogatory in nature". This advice was undoubtedly accurate. At that time he was warned that any further such communications "will result in your immediate termination".

28. There is also no dispute that, as noted, on February 14, 2011 the applicant wrote to Cas Litwin, Assistant Chief Compliance Officer, to request an investigation into his harassment complaint. The applicant's email stated:

> From: SCA [mailto: scacanada@globalserve. net]
> Sent: Monday, February 14, 2011 7:43 PM
> To: Cas Litwin
> Subject: Harassment Complaint
>
> February 14, 2011
>
> Mr. Cas Litwin
> Assistant Chief Compliance Officer
>
> Dear Mr. Litwin,
>
> RE.: Harassment Complaint
>
> Thank you for your letter of February 8, 2011, received on February 11th, 2011.
>
> As per the forwarded e-mails, which will follow this one, it will be noted that I had brought to Investia's attention the harassment that I had been subjected to by Compliance personnel, which was perpetrated in a completely un-professional way, and in derogatory, demeaning and bellicose manner, before your intervention. For some strange reason this was not taken seriously by Investia's management.
>
> I would like to remind you that in keeping with Investia's Compliance Policy and Procedures Manual, Section I, General, Sub-section (A) Standard of Conduct" All Officers, Employees , Branch Managers and Representatives must at all times deal fairly, honestly and in good faith....". Failure to comply with all applicable laws and the policies and procedures outline in this Compliance Policies & Procedures Manual may be sufficient cause for dismissal".
>
> (This applies obviously even to the employees of Compliance Department).
>
> In light of the seriousness of the harassment misconduct, in an un-fair, dishonest and bad faith manner, I'm providing you with this formal letter advising you that my expectations and undeniable rights, as all officers, employees, branch managers and representatives of Investia and Industrial Alliance as one, are as outlined in the above section of the Compliance Policy and Procedures manual, and any further harassment or similar unacceptable behaviour , should be addressed immediately by

> Investia/Industrial Alliance Executive Management, in accordance with Laws regulating Labour in Canada. In that case all previously e-mails and recorded voice messages will be retrieved and presented as evidence of the exasperating harassment.
>
> I'm certainly happy that finally this Harassment Complaint has been brought to the attention of Investia's President, as I requested early-on, in my original memo of January 18th, (see forwarded e-mail, dated Jan 18th). I strongly believe that no Corporation and its Executives are too big, nor any harassment case too small, to be kept from escalating to the highest level, and taken care of seriously. I have no doubt that Mr. DeConinck will likewise review it with his own colleagues at Industrial Alliance Executive level.
> I'm sure that at that opportunity Investia/IA Executives will wish to re-visit the unique situation were the perpetrators of harassment, its investigators, its judges and its executioners, were all and one the same people.
>
> I do share with you the hope that this most senseless (as in non-sense) act of harassment will not be repeated by yourselves at Compliance, and hence there will be no need for an immediate opening of a process of separation due to harassment, with all its most serious implications and major un-intended consequences.
> A copy of this Harassment Complaint letter will be retained in your file, obviously.
>
> Finally, as a true believer in good management practices, and not only in providing early" heads -up "to Executive Management, but also in the" open-doors" policy, I want to invite you to contact me personally, and speak to me, at your convenience, anytime you believe there is a serious issue that concerns both of us, and Investia - Industrial Alliance. Please do not hesitate at all to call me.
>
> Yours very truly,
>
> Shlomo Conforti
> Financial Advisor
>
> P.S. As soon as I receive the long overdue delivery of Investia stationery, I will mail you a hard-copy of this letter, to be retained in your hard-copy file.
> [emphasis added]

29. Given the applicant's history of blatantly unprofessional and derogatory language (as set out in the May 19, 2011 decision) and his practice of unreasonable and unfounded harassment complaints it is not surprising the company took the action it did. There are implicit threats in the body of the email and it is distinctly disrespectful in tone even if not at the same level as his earlier emails. In my view, it is apparent on the face of the application that the employer naturally came to the conclusion that the applicant was not willing to communicate in a more appropriate manner or accept compliance department oversight. The employer acted on that conclusion.

30. For all of the foregoing reasons, I am of the view that this application has no prospect of success as pleaded even if the Board has jurisdiction to inquire into it. Accordingly, the Board declines to inquire into this application and it is dismissed.

31. Finally, I understand the applicant has made a number of submissions to the Chair of the Board. He was informed that the submissions ought to be sent to me for my consideration. However, he did not do so. Nevertheless, I have reviewed the submissions which are essentially unsupported by any facts. The allegations are without merit and are dismissed by the Board.

2567-09-U; 2771-09-R Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. **Islington Nurseries Limited**, Responding Party; Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. Islington Nurseries Limited, Responding Party

Certification – Construction Industry – Evidence – Practice and Procedure – Witness –In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice –The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in

Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed

BEFORE: *Mark J. Lewis*, Vice-Chair.

APPEARANCES: *Stephen Krashinsky, Lance King, Armando Herrera, Danny Mazzotta, Carlos Pinheiro, Gaetano Strazzanti* and *Gabriel Jaramillo* appearing for the applicant; and *Joseph Liberman, Elizabeth Keenan* and *Ellen Kitzler* appearing for the responding party.

DECISION OF THE BOARD: September 23, 2011

1. Board File No. 2771-09-R is an application for certification filed under the construction industry provisions of the *Labour Relations Act 1995,* S.O. 1995, c.1, as amended (the "Act") in which, amongst other things, the applicant (the "Union") seeks to be certified pursuant to the provisions of section 11 of the Act. Board File No. 2567-09-U is the Union's companion application under section 96 of the Act containing its allegations concerning violations of various sections of the Act by the responding party ("Islington") on which the Union relies with respect to it request for relief under section 11 in its application for certification.

2. During the course of the hearing concerning these two applications, the Union brought a motion seeking the consent of the Board for it to call the evidence of one of its witnesses, Castano "Gabriel" Jaramillo ("Jaramillo"), by way of video conference. On May 6, 2011, I issued the following *bottom line* decision granting the Union's request:

> In view of the upcoming hearing dates for these matters, I have determined that it is appropriate to issue a *bottom line* decision concerning the Union's motion involving the testimony of Castano "Gabriel" Jaramillo. Having considered the submissions of the parties, and having now had an opportunity to review the documents received (on May 2, 2011) in response to my directions of April 21, 2011, I find that, in all the circumstances of this case, it is appropriate for Jaramillo to give his evidence by way of video conference. My full reasons for this ruling will follow shortly (and in advance of Jaramillo testifying) so that the appropriate arrangements can be made.

3. On the next scheduled hearing day, May 10, 2011, these matters were (somewhat unexpectedly) adjourned, at the request of the parties, to allow for settlement discussions to take place between them. However, as of the date of this decision, the Board has not been advised that these applications have been settled, and, given the importance, and unusual nature, of the subject matter of the Union's request, I have nevertheless decided to issue this decision setting out the reasons for my May 6th ruling despite the apparent ongoing settlement discussions.

Background Facts

4. The background facts necessary to determine this motion, although certainly unusual, are neither particularly complex nor in dispute.

5. Jaramillo was employed by Islington (within the bargaining unit applied for in Board File No. 2771-09-R) until October 28, 2009, when his employment was terminated. The Union asserts that, up until his discharge, Jaramillo was the key inside organiser in its campaign to

organise the employees of Islington. Further, most of (and all of the most significant of) the Union's allegations in its section 96 application, and on which it relies in its request for section 11 relief, concern, involve and/or directly relate to, Jaramillo.

6. The hearing for these matters, which commenced on May 5, 2010, has already continued over a total of nine days and, if the parties are unable to reach a settlement, it will take a significant number of further days in order to complete the hearing. The first hearing day concerned preliminary motions. On the hearing days which have followed, Islington has begun calling its witnesses (having proceeded with its case first given the nature of the Union's allegations and the onus provisions under section 96 (5) of the Act). Islington was scheduled to continue calling its case on April 21, 2011, however, on that day the parties agreed to deal with this motion instead (given the effect which its outcome might have on the remainder of the hearing). As noted above, following the issuing of my *bottom line* decision of May 6th, the next scheduled hearing days were adjourned and the parties have been engaging in ongoing settlement discussions.

7. With the exception of April 21, 2011, Jaramillo has been present at all of the hearing days in these matters. Up until that date he always acted as the Union's adviser in this hearing and it was always anticipated that he would eventually give evidence in this hearing. Further to this expectation, the witnesses who have already testified were asked (particularly in cross-examination) a number of questions concerning Jaramillo and his anticipated evidence when he is eventually called to testify.

8. When he initially arrived in Canada, Jaramillo claimed Convention Refugee Status. This claim was dismissed by the Immigration and Refugee Board, Refugee Protection Division, on November 10, 2010. Thereafter, on December 2, 2010, he filed an application for leave and judicial review of the IRB's decision with the Federal Court. The Union was aware (from the outset of these proceedings before the Board) of Jaramillo's claim for refugee status and the (subsequent) negative decision of the IRB, along with his leave and judicial review application. It, however, always believed that the hearing in these matters (or certainly Jaramillo's evidence therein) would conclude prior to the final resolution of the legal proceedings concerning Jaramillo's refugee status. Islington did not dispute the legitimacy or the reasonableness of the Union's belief concerning which legal proceeding was likely to conclude first.

9. In or about March 2011, Jaramillo voluntarily left Canada and returned to Colombia, allegedly because both of his parents had become seriously ill. This, according to the various documents which the Union was able to obtain from Jaramillo's immigration lawyer, had the effect of discontinuing his application for leave and judicial review (as of March 31, 2011). The discontinuation of that application, in turn, immediately brought into effect the *Conditional Departure Order* which was originally issued against Jaramillo when his claim for refugee status was first referred to the IRB in or about September, 2008, but which would not normally come into effect until the conclusion of the legal process concerning his claim.

10. The Union asserted, and Islington did not dispute, that, given that the Departure Order is now in effect against him, Jaramillo can only return to Canada with special Ministerial consent. Such consent is, apparently, extremely difficult to obtain. Therefore, both of these parties agreed that it was now effectively *impossible* for Jaramillo to come to the Board and testify, in person, in these proceedings.

11. Although he is not able to re-enter Canada in order to testify, the Union asserted that Jaramillo is willing and able to give evidence, from Colombia, by way of video conference and that such a conference can be arranged with relative ease by a company (that the Union has already been in contact with) which provides such services on a regular basis. The video conference arrangements proposed by the Union would allow for all of the other participants to be present at the Board while Jaramillo remained in Colombia but all of them (us) would be able to speak to, hear and see each other, by way of the video conference equipment which would include at least two large video screens (one at the Board and one at Jaramillo's location in Colombia). Finally, the Union undertook, not only to make the necessary arrangements but also, to bear the full costs of such arrangements, should its request be granted.

Rule 38.5 and the Positions of the Parties

12. Both the Union and Islington centred their respective arguments concerning this request on Rule 38.5 of the Board's Rules of Procedure. This rule appears in Part VII of the Board's Rules, which is entitled *Hearing Procedures and Administration,* and specifically relates to the holding of *Electronic Hearings.* It states:

> **38.5** The Board may conduct an electronic hearing in any case before it, as the Board considers advisable. Unless the only purpose of the hearing is to deal with procedural matters, the Board will not conduct an electronic hearing if a party satisfies it that holding an electronic hearing is likely to cause the party significant prejudice.

13. The basic position of the Union is that, pursuant to Rule 38.5, the Board clearly has the jurisdiction to hold an electronic hearing and that it should do so in the appropriate circumstances. According to the Union, determining whether or not the appropriate circumstances exist in any particular case involves a balancing of various factors including: the nature and seriousness of the issues to be determined; the reason(s) for the request; and, the competing harms which may arise as a result of proceeding, or refusing to proceed, by way of electronic hearing. In the Union's view the balancing of the relevant factors in this particular situation overwhelmingly favours the granting of its request. Specifically, it relies on the fact that the issues which must be determined in these applications are extremely serious, involving as they do an application for certification by way of remedial relief under section 11 of the Act and the inability of the employees in the bargaining unit to express their true wishes concerning union representation as a result of (alleged) violations of various sections of the Act, including the (alleged) termination of Jaramillo because of his involvement in, and his support for, the Union's organizing efforts. The reason for the request concerns the impossibility of Jaramillo being able to testify in person before the Board as he is not able to re-enter Canada. In terms of prejudice, the Union asserts that it will suffer severe prejudice, which may even be fatal to both of these applications, if it is not able to call Jaramillo as a witness as virtually all of its allegations of violations of the Act centre on him and his evidence. The Union accepts that matters of credibility are extremely relevant in these proceedings and, as such, having Jaramillo testify in person before the Board would be the preferred option but argues that, as this is simply not possible any more, having him testify by way of video conference is the best available alternative. Based on various decisions of this Board, other tribunals and the courts (which are dealt with in greater detail hereinafter), the Union argues that proceeding by way of video conference, as opposed to other forms of electronic hearing such as by way of teleconference, will effectively

eliminate any prejudice which might otherwise arise as a result of Jaramillo not giving his evidence in person, including eliminating any prejudice related to the Board's ability to assess his overall evidence and make findings of credibility. Finally, the Union also asserts that, to the extent that the Board might have any concerns with respect to prejudice to Islington (and in particular, with respect to the fact it would be required to cross-examine Jaramillo by way of video link as opposed to in person), such potential prejudice is not the *serious prejudice* contemplated by Rule 38.5 and can be easily dealt with by way of taking into account the fact that he testified by video conference when determining what weight to give to his evidence.

14. Islington's positions are (not surprisingly) very different from those of the Union, both in terms of the general application of Rule 38.5 and the specific result which should be reached given the particular circumstances involved here. The starting point of its argument concerning the application of this rule is that, as the requested electronic hearing does not involve a procedural matter, the Board's discretion to order any such hearing is specifically limited by the second sentence of Rule 38.5. In this respect, Islington asserts that the balancing, by the Board, of the various factors related to the exercise of it discretion to hold an electronic hearing (which the Union relies upon to support its request) is, under the specific wording of this rule, a secondary step. In its view, the Board should not, and in fact is not entitled to, proceed to this (second) step involving the balancing of various factors if the Board is *satisfied that holding an electronic hearing is likely to cause the* party [opposing the request] *significant prejudice*. Under this approach all of the other factors (including the issues involved, the reason for the request, and any potential prejudice to the Union and its case) are subservient to any (likely) serious prejudice to Islington and, as such, are not even considered if it can be established that any such (serious) prejudice is in fact likely to result.

15. Here, Islington takes the position that it is likely to suffer serious prejudice if the Board were to proceed by way of video conference. In support of this position it relies on the general proposition, as expressed in the Board's jurisprudence, that electronic hearings are not appropriate in cases which involve issues of credibility as requiring a witness to give his or her evidence in person provides for the best method of assessing credibility. Accordingly, it argues that any deviation from the requirement for in-person evidence, particularly in circumstances involving a key witnesses in a matter in which issues of credibility are central (as is undeniably the case here for Jaramillo), is likely to result in it suffering significant prejudice.

16. Further, Islington asserts that it has the right to have the Union's witnesses give their evidence in *open court* and to cross-examine those witnesses, face-to-face and in the same hearing room. Islington argues that the physical proximity of parties, witnesses and the person(s) judging the case, which occurs when witnesses give oral evidence in the normal (in-person) course, is a vital part of the overall hearing process and is, in particular, vital to its ability to effectively cross-examine the witnesses called to give evidence against it and that this will be lost, causing it serious prejudice, if the hearing was to proceed by way of video conference. Further, it states that this right (to physically face and cross-examine the witnesses giving evidence against it) is of increased importance in this case where it is required to overcome the reverse onus which is imposed upon employers by section 96(5) of the Act and therefore the denial of this right would be even more prejudicial. According to Islington, the prejudice which it will suffer would not be overcome simply because (in the case of video conferencing and as opposed to teleconferencing) the parties, the witness and the Board will be able to see each other on video screens as Jaramillo will be thousands of miles (and in fact in another continent) from the lawyer cross-examining him and the institution (being the Board) which is imposing the obligation upon

him to tell the truth, particularly in these circumstances where Jaramillo no longer has any ongoing connection to Ontario (and indeed Canada) and any of its legal institutions.

17. In the alternative, and if the Board is not prepared to automatically dismiss this request based exclusively on the serious prejudice which it is likely to suffer (pursuant to the second sentence of Rule 38.5), Islington argues that a balancing of all of the factors which the Union asked the Board to consider still dictates that this request should be denied. In particular, while it agrees that the issues at stake in these applications are serious, Islington asserts that this seriousness is the very reason why the Board should not depart from its normal requirement for witnesses to give evidence in person, and especially here where issues of credibility are so important to the findings which the Board must make. In this respect, Islington states that all of the decisions upon which the Union relies (and as discussed below) establish that electronic hearings are not appropriate when serious issues of credibility must be determined. Finally, while it does not dispute that it is now *impossible* for Jaramillo to return to Canada to give his evidence in person, Islington vigorously argues that this impossibility should not provide the basis for the granting of the Union's request given that it was Jaramillo himself who created this situation by voluntarily, and suddenly, leaving the country. Further to this position, Islington also questions how the Board could put any reliance on the evidence of Jaramillo given that (to paraphrase the Union) *his life in Canada is now over* and as such he has no interest in, and bears no allegiance to, this country and/or any of its legal institutions or laws.

Decision

The Analytical Framework

18. Notwithstanding the manner in which both parties chose to frame their principal arguments, I am not entirely convinced that Rule 38.5 is directly applicable to what I must decide here. This Rule deals with *electronic hearings*. Clearly, an electronic hearing could be conducted by way of video conferencing but these applications have not proceeded by way of electronic hearing up until now and, in my view, the *hearing* of these applications will not necessarily become an *electronic hearing* simply because of my ruling with respect the Union's motion concerning Jaramillo's evidence.

19. As referred to above, thus far there have been nine days of hearing in these matters. On each one of those days, the parties, their counsel and myself (as the Vice-Chair assigned to hear these applications) have all been present at the Board. Barring some extraordinary turn of events this will also be the case on all future hearing days. So far three witnesses have given evidence, in person, before me. Before these matters conclude, a number of other witnesses will also be giving such, in person, evidence and, at the conclusion of all of the evidence, counsel for both the Union and the Employer will have a full opportunity to make their final arguments, orally and in person, before the Board. Given these facts concerning how these applications have so far proceeded, and will proceed in the future, it is, then, possible to characterise the Union's request concerning Jaramillo not so much as a request for the Board to conduct an electronic hearing but rather as a request for the Board to receive certain, limited (if nevertheless important), evidence in a particular manner. However, even if Jeramillo's testimony is not a *hearing* in and of itself, it is certainly part of this hearing, and a very significant part at that. Further, the factors to be considered are virtually identical whether this motion is treated as a request for an electronic hearing under Rule 38.5 or as a request for the Board to admit certain evidence under section 111(2) of the Act and/or section 15(1) of the *Statutory Powers Procedure Act,* R.S.O. 1990, C.

S.22, as amended (the "SPPA"). Accordingly, and as the Board's *test* concerning electronic hearings under the Rule 38.5 is, at least arguably, stricter than any test which the Board might apply to the admission of evidence (and is, therefore, more favourable to Islington's position), I will deal with this motion as being one which involves a request for an electronic hearing under the Board's Rules.

20. Given the specific language of Rule 38.5, I agree with Islington's position concerning the appropriate analytical framework to be used by the Board in determining whether or not it will conduct an electronic hearing. This Rule makes clear that the Board has the discretion to proceed by way of electronic hearing. However, it also makes clear, in its second sentence, that, with respect to matters which are not procedural, the Board will not exercise that discretion where it is satisfied that holding an electronic hearing is likely to cause a party significant prejudice. As a matter of statute, the Board has control over its own practices and procedures (including its Rules) and, therefore, it is conceivable that in a particular case the Board might choose to vary the strict application of Rule 38.5 but any such case would have to involve the most extraordinary of circumstances. Accordingly, in the normal course, the application of Rule 38.5 (in matters which are not procedural) involves a two step analysis. First, the Board must determine whether significant prejudice to the party opposing the electronic hearing would likely result if such an electronic hearing is held and, if this is the case, the hearing will not proceed electronically. If it does not find that such significant prejudice to the opposing party is likely to result, the Board will then go on to determine whether it should proceed by way of electronic hearing by considering all of the appropriate relevant factors. The most important of these factors are listed above in the summary of the Union's position and will always include a balancing of the competing harms which may result if an electronic hearing is, or is not, held.

Significant Prejudice

21. There are, as of yet, only a limited number of Board decisions which deal with Rule 38.5. However, the two decisions which have seriously considered this particular Rule (in circumstances other than procedural ones) have made clear that it is always preferable in cases which are long, complex and/or involve issues of credibility for witnesses to testify before the Board in person. For example, in Hi-Tek Dev. Inc., 2008 OLRB Rep. November/December 803 the Board stated:

> **34** Finally, counsel for the responding party submitted that if I were to conclude that any of the applicant's witnesses ought to be given an opportunity to have "this brief contradictory evidence put to them", that opportunity could be accomplished in an expeditious manner by way of telephone conference or video conference. This was an option that I considered in *The Board of Education for the City of Windsor*.
>
> **35** In this case, the option of telephone conference or video conference is not particularly attractive. For the reasons identified above, I do not believe that the evidence to be heard from the four witnesses to date regarding Mr. Witkowski's observations on the application filing date would be fairly characterized as "brief". The situation in *The Board of Education for the City of Windsor* was different, because the substance of the evidence to be put to the two witnesses was very limited. Furthermore, based on the evidence to date, it appears that the credibility of all witnesses will be an important

> consideration. In that context, it is preferable that the testimony of all witnesses be taken in person, if at all possible.

22. In addition, in *G.R.M. Contracting Ltd.,* Board File No. 3404-99-ES, 2000 CanLII 2980 (ON L.R.B.) (hereinafter referred to as "*G.R.M. No. 1*"), the Board stated:

> 3. The Board does not normally conduct its hearings by telephone or through electronic means. Where there are factual matters in issue, it is obviously preferable for the Board to hear and see witnesses giving their evidence. Nevertheless, the *Statutory Powers Procedure Act*, R. S. O. 1990, c. S. 22 (the "SPPA") does permit tribunals, such as the Board when it is engaged in proceedings under the Act, to conduct electronic hearings in certain circumstances. Section 5.2 of the SPPA provides:
>
> > (1) A tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding.
> >
> > (2) The tribunal shall not hold an electronic hearing if a party satisfies the tribunal that holding an electronic rather than an oral hearing is likely to cause the party significant prejudice.
> >
> > (3) Subsection (2) does not apply if the only purpose of the hearing is to deal with procedural matters.
> >
> > (4) In an electronic hearing, all the parties and the members of the tribunal participating in the hearing must be able to hear one another and any witnesses throughout the hearing.
>
> The Board Rules provided for electronic hearings. Rule 53 of the Board's Rules of Procedure states:
>
> > The Board may conduct an electronic hearing in any case before it, as the Board considers advisable. Unless the only purpose of the hearing is to deal with procedural matters, the Board will not conduct an electronic hearing if a party satisfies it that holding an electronic hearing is likely to cause the party significant prejudice.
>
> Rule 53 applies to proceedings before the Board under the Act by virtue of Rules 3 and 107 of the Board's Rules of Procedure. Therefore, I am satisfied that the Board may, if it considers it advisable, conduct an electronic hearing in this application.

23. Both the evidence in this case generally, and Jaramillo's anticipated evidence in particular, are long and complex and involve a great many issues of credibility which are central to the ultimate result. Accordingly, given the statements of the Board concerning its *preference* in such situations, as set out in the above noted decisions, I am prepared to assume that here some prejudice is likely to result if the Board conducts an electronic hearing, including a hearing conducted by way of video conference. However, given the wording of Rule 38.5, it is not any prejudice to the objecting party which will automatically result in the Board refusing to hold an

electronic hearing. Rather, under this, first, prong of the test (which the Rule provides for) what must be considered is the likelihood of *significant prejudice* and, in these circumstances, I do not find that any such significant prejudice to Islington is in fact likely.

24. With respect to the potential prejudice which electronic hearings may generally give rise to in cases which involve issues of credibility, the Board stated the following in *G.R.M. Contracting Ltd.*, Board File No. 3404-99-ES, 2000 CanLII 10389 (ON L.R.B.) (hereinafter referred to as "*G.R.M. No. 2*"):

> 3. The Board described the applicant's basis for seeking an electronic hearing at paragraph four of its December 7, 2000 decision which stated:
>
> > Counsel for the applicant seeks to have an electronic hearing on the grounds that the applicant has moved to Ottawa and is employed there. Counsel submits that imposing the burden of travelling to Toronto for the hearing in order that he attend the hearing in person would create an extreme hardship for him. In addition, counsel submits that this time of year is a very busy time for the applicant, who works evenings, so that an electronic hearing during the day would enable the applicant, in the words of his counsel, "to secure his current employment".
>
> It seems to me that the essence of the basis for the applicant's request for an electronic hearing is that it is not convenient for the applicant, who has moved to Ottawa, to return to Toronto to attend the hearing.
>
> 4. The Board prefers to hear and see witnesses giving their evidence when there are factual matters in dispute. Receiving the testimony of a witness in a hearing being conducted by telephone conference call does not permit the Board or the parties to be satisfied that the witness is not reviewing notes or is not being coached by someone who is present but does not say anything audible to everyone else participating in the conference call. Also, the ability to conduct an effective cross-examination would, in my view, be significantly impaired if it were done over the telephone. The Board does not receive affidavit evidence to prove facts in dispute in litigation before the Board because it is important for the Board to be able to assess credibility and observe the demeanour of witnesses in order for it to come to a proper decision.
>
> 5. In my view, conducting an electronic hearing where oral testimony is to be adduced should only take place in extraordinary circumstances and where the Board can be assured that the witness giving evidence in another location is not being assisted, whether by another person who is present but cannot be seen or heard, or by having notes or other forms of an *aide-mémoire* to which the witness might refer. Furthermore, a party adverse in interest to the witness must have the ability to put documents or other exhibits to the witness in cross-examination during the course of a hearing. Conducting a hearing merely by telephone conference call does not allow that to take place. See, for example, the decision of the Adjudicator/Referee in *Filet of Sole Sea Grill Limited*, unreported, decision dated December 1, 2000, Board File No. 2365-96-ES (Trachuk) in which she wrote at paragraph 2:

> The Adjudicator/Referee will not permit evidence to be presented by way of a telephone call. A witness must be present in the hearing room where she may be observed giving her testimony, where she may present any relevant documents and where she may be cross-examined in person.

Although being able to hear a witness is the minimum standard under section 5.2(4) of the *Statutory Powers Procedure Act*, I believe that it is not advisable for the Board to conduct an electronic hearing in which a witness is required to testify unless the Board can be assured that the witness is not being assisted while giving evidence and there is a facility for the witness and the parties in their various locations to receive and review documents and exhibits that may be tendered during the course of the hearing.

6. In this case, the application relates to a claim that the applicant was an employee of one of either Betty Ross or G.R.M. Contracting Ltd. The Employment Standards Officer concluded that there was no employment relationship with the applicant. The resolution of this type of issue is often very fact specific and there may well be disagreement over the facts. Indeed, I note that the applicant, by his counsel, filed four pages of detailed submissions dated February 20, 2000 with his application, outlining the factual basis of the claim. Thus, it seems that this application will turn on my findings of fact concerning the relationship between the applicant and Betty Ross or G.R.M. Contracting Ltd. Although I have the discretion under Rule 53 of the Board's Rules of Procedure to conduct an electronic hearing, I do not consider it advisable to do so in this case where the result of the application will depend, to a significant degree, on my findings of fact after hearing evidence that is likely to be in dispute.

7. The motion by the applicant for an electronic hearing is dismissed. This matter will proceed before this panel of the Board on December 20, 2000 at the time and place set out in the notice of hearing issued by the Registrar dated October 11, 2000.

25. However, in *G.M.R. No. 2, supra*, the Board was dealing with a request to conduct a hearing by way of teleconference and much of the potential prejudice it referred to in that decision can be greatly reduced, if not eliminated entirely, by the use of a video conference (especially when the advances in the relevant technology which have occurred in the eleven years since the decision in *G.M.R. No. 2, supra,* are taken into account). In this respect, the effect (or lack thereof) on a decision maker's ability to reach conclusions concerning the credibility of a witness giving evidence by way of video conference was thoroughly considered by the Ontario Superior Court of Justice in *Pack All Manufacturing Inc. and Triad Plastics Inc.*, [2001] O.J. No. 5882, in which Rutherford J. concluded:

> [6] In my experience, a trial judge can see, hear and evaluate a witness' testimony very well, assuming the video-conference arrangements are good. Seeing the witness, full face on in colour and live in a conference facility is arguably as good or better than seeing the same witness obliquely from one side as is the case in our traditional courtrooms here in the Ottawa Court House. The demeanor of the witness can be observed, although perhaps not the full body, but then, sitting in a witness box is not significantly better in

> this regard. Indeed, I often wonder whether too much isn't made of the possible ability to assess the credibility of a witness from the way a witness appears while giving evidence. Doubtless there are "body language" clues which, if properly interpreted, may add to the totality of one's human judgment as to the credibility of an account given by a witness. The danger lies in misinterpreting such "body language," taking nervousness for uncertainty or insincerity, for example, or shyness and hesitation for doubt. An apparent boldness or assertiveness may be mistaken for candour and knowledge while it may merely be a developed technique designed for persuasion. Much more important is how the substance of a witness' evidence co-incides logically, or naturally, with what appears beyond dispute, either from proven facts or deduced likelihood. I am not at all certain that much weight can or should be placed on the advantage a trier of fact will derive from having a witness live and in person in the witness box as opposed to on a good quality, decent sized colour monitor in a video-conference. While perhaps a presumption of some benefit goes to the live, in person appearance, it is arguable that some witnesses may perform more capably and feel under less pressure in a local video-conference with fewer strangers present and no journeying to be done.

26. Further, the same issue was extensively analysed by the Human Rights Tribunal of Ontario (considering a request that a particular witness be allowed to testify by video conference in the context of a rule which is substantially identical to Rule 38.5) in *Brandy Johnson,* File No. HR-0730-04, 2004 CanLII 18 (HRTO), in which it stated:

> [29] I respectfully agree with Rutherford J. that video conferencing, if technologically sound, is likely to provide a good opportunity for the trier of fact to observe the witness. Although I recognize, as did Rutherford J., that too much can be made of the importance of observing a witness in assessing credibility, it is undoubtedly true that audio conferencing alone does deprive the trier of fact and the parties of some opportunity to observe a witness while testifying.
>
> ...
>
> [31] Of course, any consideration of *Criminal Code* provisions in the context of a human rights hearing is necessarily limited. However, the *Criminal Code* provisions reinforce my own view that there is a significant distinction between video and audio conferencing. It is difficult to see how, in the ordinary case, evidence taken by video conferencing (assuming that it is properly functioning) is likely to prejudice any of the parties. The technology permits all parties, including the trier of fact, to fully observe the witness while testifying. This not only facilitates the assessment of credibility, but the conduct of the examinations of the witness. It is therefore not surprising that the *Criminal Code* specifically directs the court to consider, when audio evidence is proposed, whether there is any potential prejudice to either of the parties caused by the fact that the witness would not be seen by them. Where video evidence is proposed, there is no specific direction to consider potential prejudice to the parties. In my view, it is recognized that potential prejudice figures more prominently in a situation where audio evidence only is being considered.
>
> ...
>
> [34] There are compelling reasons why Ms Furey's evidence should be taken electronically. She resides in Nunavut. It would be difficult and

> somewhat disruptive for her to travel to Southern Ontario to testify *viva voce*. There are significant financial costs associated with having Ms Furey testify in person. (In that regard, the Commission's overall budget says little about the expenditure of public funds in individual cases.) Evidence can be taken electronically here under conditions that permit the fullest scope of examination and cross-examination. This case does not involve voluminous documentation. The most significant indicia of credibility and reliability – namely the internal consistency of the evidence and its relationship to other evidence can be fully addressed and evaluated without seeing the witness. Indeed, it is now well recognized in the jurisprudence that the "demeanour" of a witness is often an inadequate basis upon which the trier of fact should assess credibility or reliability. Over-reliance upon the purported demeanour of a witness to explain why that witness' evidence was accepted or rejected may even constitute reversible error: See, for example, *R. v. Gostick* 1999 CanLII 3125 (ON C.A.), (1999), 137 C.C.C. (3d) 53 (Ont.C.A.). Finally, the trier of fact is entitled to evaluate whether his or her inability to observe the witness may, in limited circumstances, prevent the trier of fact from relying upon that witness. That is arguably the price that the proponent of that witness' evidence may pay by seeking to tender the witness electronically.
>
> ...
>
> [36] In the totality of the circumstances, I am satisfied that the respondent would not be significantly prejudiced if Ms Furey's evidence were taken electronically, whether by video or telephone conferencing. However, it is my preference that, if reasonably practicable, her evidence be taken by way of video conferencing. Ms Rosen candidly acknowledged that no inquiries had been made as to the practicability of taking Ms Furey's evidence by way of video conferencing. Ms Rosen's information about prior difficulties with video conferencing was unrelated to Nunavut.

27. Finally, the same conclusions have been reached by panels of both the Immigration and Refugee Board of Canada Immigration Appeal Division ("IRB") and the Alberta Securities Commission, although without the same level of detailed analysis. In *Morris v. Canada,* [1999] I.A.D.D. No. 16, T. Maziarz of the IRB stated:

> **8** As for the appellant's counsel's concern that it would be difficult for the panel to assess the credibility of the appellant through a video-conference hearing, such was not the case, as, in accordance with Rule 25, all persons participating in the hearing, including the appellant, were able to communicate effectively. Also, the panel was able to observe the appellant's demeanour and is, in any event, mindful of the decisions of the Federal Court, to the effect that, generally speaking, the demeanour of a witness is not necessarily a determinative factor in the assessment of credibility, since body language and comportment, for example, may be open to various interpretations.

In *Re: Hennig*, 2006 LNABASC 855, a panel of the Alberta Securities Commission stated:

> **18** Videoconferencing may affect, to some degree, the ability of a decision-maker or other observer to discern a witness' demeanour as he gives evidence and thus might affect to some extent the assessment of credibility. However, the court in *De Carvalho* specifically addressed this issue (at para. 17):

> ... the state of technology is now such that when video conferencing is properly carried out, in my opinion, a good view can be had of the witness for the purposes of assisting in assessing credibility through that medium.
>
> **19** We agree. We do not believe that the physical absence of a witness from the hearing room is necessarily fatal to a decision-maker's ability to assess credibility, irrespective of whether counsel have themselves had a previous opportunity to question the witness face-to-face.
>
> **20** We therefore conclude that in appropriate, unusual circumstances, testimony by live videoconference can be an acceptable alternative to physical presence in the hearing room. The differences between in-person and videoconference testimony, and their effects on the decision-maker's ability to assess credibility from the witness' demeanour, are likely to depend on the quality of the technology used and its effectiveness in the particular proceeding. Those factors will become apparent in the course of the proceeding and may properly be taken into account in the decision-maker's later determination of the weight to be assigned to the video evidence. As such, the party seeking to rely on videoconference testimony incurs a risk that the evidence will not be accorded the weight it might be given had it been received in person.

28. Quite simply, electronic hearings conducted by way of video conference are materially different from those conducted by way of teleconference. Depending on the quality of the arrangements and the equipment to be used, video conference hearings now have the potential to reduce and/or eliminate most of the problems which had previously so greatly concerned the Board when considering requests for teleconference hearings. Specifically, with video conferences it is possible for the Board, and the parties, to see the witness while he or she gives evidence and to know (with far greater certainty) that the witness is not being coached and/or using inappropriate documents or materials. Accordingly, and for the reasons set out in both *Pack All, supra* and *Brandy Johnson, supra*, it simply cannot be automatically concluded that any prejudice which may result from a witness giving evidence by way of video conference is likely to be significant, even in cases which are long and complex and/or which involve issues of credibility.

29. Despite the above conclusions, Islington's specific argument concerning the effect on its ability to cross-examine Jaramillo should he give evidence by way of video conference is, although related to the question of the Board's overall ability to reach conclusions concerning credibility, sufficiently distinct and is, potentially, so serious, that it must be considered independently of the more general arguments concerning the ability to determine credibility. The right of a party to cross-examine witnesses who are called to give evidence against it is central to our legal system. Further, this right is obviously of particular importance in situations where, as here, issues of credibility must be decided, given that, under our adversarial system of justice, it is only after a witness has been subjected to cross-examination by the party opposite that the finder of fact is in a position to decide whether that witness was telling the truth or not. Accordingly, anything which might hinder a party's ability to cross-examine a witness effectively could quite obviously result in significant prejudice to that party. As Islington relied upon, this specific argument, concerning the effect of video conferences on the ability of a party to cross-examine a witness effectively, was considered by Rutherford J. in *Pack All, supra,* who stated:

> **7.** Mr. Ducasse argued that counsel cross-examining is not engaged in the same way as is possible with the witness live, in the same room, with the result that the ability to effectively cross-examine is impaired. I grant that this may indeed be so although whether or to what degree the effectiveness of any particular cross-examiner might be impaired is very difficult to measure. It probably would depend upon the witnesses and the individual circumstances of the case.

30. However, with respect to this argument concerning Islington's ability to effectively cross-examine Jaramillo if he testifies by way of video conference, the question (at this stage) still remains one of – is it likely to result in significant prejudice (to Islington)? Given this question, the decision of the court in *Pack All, supra,* in fact supports the Union's, rather than Islington's, position. As the above quoted passage clearly establishes, while Rutherford J. agreed that it is possible that the use of video conferencing might impair cross-examination, he ultimately concluded that whether, and if so to what extent, it might do so, *probably would depend upon the witnesses and the individual circumstances of the case.* Further, although the *contention of counsel for the defendant that cross-examination* [by video conference] *of an important witness whose credibility is important to the trial may be rendered less effective* was clearly a factor which Rutherford J. considered in rejecting the request (to allow a witness who lived in Virginia to testify by way of video conference) at no point did he state that such a *contention* can be automatically assumed to be likely to result in any, let alone any significant, prejudice. In fact, the possible effect on cross-examination was not even the most important reason for Rutherford J. in rejecting the applicant's request in *Pack All, supra*, which he clearly stated was his finding that there was simply no reason why the witness in question could not, or would not, come to Ottawa to testify in person if her relatively minimal expenses were paid. Finally, although denying the applicant's request Rutherford J clearly indicated that he had not, in fact, concluded that any prejudice (let alone any significant prejudice) would necessarily result if the witness had been allowed to testify by video conference in that he stated the following, at the end of his decision, concerning how the trial judge should deal with this situation:

> [9] While there is much to be said for using the modern technology available and taking evidence by video-conference, it is not a manner of taking evidence available to parties as matter of right. Unless consented to by the opposite party, the Court must balance the relevant factors and determine whether the advantages of using video-conferencing outweigh the possible prejudice that might arise. In this case the balancing of interests is difficult. I'd say it is a close call. Inclined as I am to side with efficiency and the saving of time and cost, I am not persuaded by the plaintiff's application that there is enough to be gained to overcome the conventional rule that evidence be given by a witness, in person, in court, and the contention by counsel for the defendant that cross-examination of this important witness whose credibility is important to the trial may be rendered less effective. Here, since the defendant has consented to video-conference evidence for certain other witnesses, the additional expense is limited to only one witness. Perhaps most importantly, there is no evidence that the witness in question is unable or unwilling for any reason to come to Ottawa and testify of her own volition, assuming all her expenses are paid. Her evidence is important and the cost of bringing her is not all that great in relation to the amount of money at issue in the trial, which I am advised is somewhere in the range of $80,000 to $105,000, including claims by both the defendant and the plaintiff.

> [10] If the plaintiff brings the witness to Canada and she testifies, and if the plaintiff is successful at trial and the trial judge is of the view that the evidence could equally well have been presented by video-conference, it would certainly be open to the plaintiff to seek to have the fact that some cost savings and conveniencing of a witness was precluded by the defendant's opposition to this motion addressed appropriately in any award as to costs.

31. Quite simply, then, *Pack All, supra,* does not stand for the proposition that it can be automatically assumed that proceeding by way of video conference (even for major witnesses whose credibility is important for the ultimate determination of the case) will sufficiently impair cross-examination such that significant prejudice is likely. At best (from the perspective of Islington's argument) this decision establishes that any conclusions about prejudice to a party's right/ability to effectively cross-examine must be made on a witness-by-witness and case-by-case basis.

32. As already stated, there can be no question that having a witness' evidence-in-chief tested by having to answer questions from the opposing party (in cross-examination) is vital to the process of litigation before the Board. However, allowing Jaramillo to testify by video conference will not in anyway limit Islington's right to question him or the requirement that he fully answer all of the (appropriate) questions that are put to him. In this, fundamental, sense his cross-examination will be no different from that of all of the other witnesses and, therefore, what must be determined is – will the fact that the cross-examination will be *mediated* (through the use of video equipment) result in it being seriously (and negatively) effected?

33. At its core, cross-examination is a verbal exchange (almost a conversation) between two people, namely the counsel asking the questions and the witness answering them. Whether it is conducted in a low-key manner, with counsel gently suggesting and/or guiding the witness towards certain answers, or in a more confrontational manner, with counsel putting the witness under pressure and implying that s/he is not being truthful, most counsel would agree that anything which breaks or interferes with the rhythm and directness of the exchange between the witness and the questioner is likely to make the cross-examination less effective. This does not, however, mean that every time cross-examination is not direct, but is mediated in some way, serious prejudice is likely to result. The most obvious example of this phenomenon, which regularly occurs at the Board, arises in the cross-examination of witnesses who do not speak English (or French). In such situations counsel cannot question the witnesses directly but are instead forced to use interpreters. No interpreter, however skilled, is capable of translating the exact tone of the questioner's voice (whether that is one of understanding, disbelief or contempt) or can replicate every nuance and subtlety (including any slight hesitation or doubt) of the witness' answers. For such reasons, almost all counsel would agree that it is generally much harder to cross-examine a witness who is testifying through an interpreter and as such the cross-examination may be less effective. Accordingly, it is the Board's general preference to have witnesses give their evidence in English (or French) if at all possible. However, in situations where that is not possible (and as long as duly qualified and competent interpreters are used) any prejudice to the cross-examining party is not so significant that such witnesses are not allowed to testify at all. Rather, the hearing proceeds (with the use of interpreters for the testimony of appropriate witnesses) and any prejudice to the ability of a party to effectively cross-examine non-English speaking witnesses which may result is dealt with by way of submissions concerning the weight which should be given to their evidence.

34. In my view the effect of video conferencing on the ability of a party to effectively cross-examine a witness is, in a general theoretical sense, similar to the effect caused by the use of interpreters. In both cases, the interaction between counsel and the witness is not direct and therefore cross-examination may well be more difficult to conduct, which in turn may make it less effective. Accordingly (and for various other reasons), neither are the Board's preferred option but this does not mean it can be automatically assumed that they will result in significant prejudice if and when they are used. Further, depending on the sophistication and quality of the arrangements and equipment, a cross-examination conducted by way of video conference may in many ways be far more direct, and far less mediated, than one conducted through an interpreter. Accordingly, I am not prepared to conclude that the Union's request should be dismissed based on Islington's argument concerning the effect on cross-examination as I do not agree that the use of video conferencing significantly limits a party's ability to cross-examine effectively and that, therefore severe prejudice is likely to result, even in cases which involve issues of credibility.

35. The above set out general conclusion, concerning video conferences and the Board's ability to make findings related to credibility and the opposing party's ability to cross-examine effectively, are, of course, exactly that, simply general conclusions. The Board must still consider the specific circumstances of each individual case, as it is possible that the particular circumstances of a case could lead to a finding that proceeding by way of video conference is likely to result in significant prejudice to the objecting party. In this respect, Islington asserts that here the relationship of Jaramillo to Canada and Canadian legal institutions (such as the Board) leads to the conclusion that any evidence he might give by way of video conference will be inherently unreliable and that therefore it will be significantly prejudiced should he be allowed to give evidence in such a manner.

36. Islington bases this argument concerning the inherent unreliability of Jaramillo's evidence on the fact that he is no longer in Canada (let alone in Ontario) and will not, and realistically now cannot, ever return to Canada. It argues that, where an individual has removed himself from the Board's jurisdiction, and will never be returning to that jurisdiction, he has no incentive or reason to tell the truth given that the laws and legal institutions of Canada and Ontario are effectively meaningless to him. As such, it takes the position that the Board can have absolutely no confidence in any evidence which Jaramillo may give, by way of video conference, from over 3,000 miles away in Colombia.

37. In considering this argument, I am prepared to conclude that it is possible that individuals who have no ongoing ties to Canada and/or Ontario may take our legal system and its institutions less seriously than permanent residents of this province. For example, explaining to a witness that *intentionally breaking his promise to the Board to tell the truth may be an offence under our laws* is likely to mean more to a person who actually lives in Ontario (or at least Canada) than a person who does not. However, any problems which may arise with the evidence of such, out of province/country, witnesses are caused by where those witness live and are not related to the manner in which they give evidence. Here, for example, exactly the same concerns would arise with respect to Jaramillo's ongoing interest in, and respect for, the laws of this Province and the Board's procedures whether he gives his evidence by way of video conference or if the Union was miraculously able to obtain a Ministerial exemption allowing him to re-enter Canada for the sole purposes of giving his evidence in person. Accordingly, any concerns about Jaramillo's respect for the Board and its processes (including the effectiveness of administering the oath to tell the truth) which might arise are not related to the holding of an electronic hearing.

In this sense any such concerns simply form part of the various factors which the Board must consider in reaching its overall conclusions concerning his credibility, just as the Board must do in relation to all of the other witnesses, and do not constitute prejudice (let alone significant prejudice) resulting from an electronic hearing and within the meaning of Rule 38.5.

38. Finally, Islington raised the fact that Jaramillo would be testifying from Colombia (as opposed to from within Canada or America as was the case with the witnesses in the various decisions concerning video conferencing which the Union relied upon) in support of its arguments concerning both significant prejudice (under the first step of the Rule 38.5 test) and the balancing of competing harms (under the test's second step). Although my knowledge of Colombian affairs is limited to the reports in various news media, I am, for the purposes of this decision, prepared to assume, as Islington argued, that certain groups within Colombia have a limited (if any) regard for existing legal institutions, systems and procedures and may in fact have a vested interest in undermining such institutions, systems and procedures. Such an assumption might, in certain specific types of cases (involving the smuggling of narcotics, for example), lead a Canadian court or tribunal to question the reliability of the evidence of a witnesses testifying from Colombia by way of video conference. However, this is not such a case. In short, in the circumstances of this case, I am not prepared to conclude that the mere fact that Jeramillo is in Colombia (and would be testifying from there) gives rise to significant prejudice in terms of either any logistical difficulties in arranging for the video conference or because of any general break down of law and order (as might be the case in certain other countries or areas).

39. Accordingly, for all the reasons set out above, I do not find that allowing Jaramillo to testify by video conference is likely to result in significant prejudice to Islington and, therefore, I must proceed to the second step of the Rule 38.5 test in determining whether the Union's request for an electronic hearing should be granted.

Consideration of Relevant Factors

40. Having concluded that Islington will not likely suffer significant prejudice if Jaramillo gives evidence by way of a (properly arranged/established) video conference, it is necessary to move to the second step of the test provided for by Rule 38.5, being the balancing of all of the relevant factors to determine whether or not the overall circumstances of this request favour the holding of an electronic hearing. As noted above, the number of times the Board has considered Rule 38.5 is minimal and the Board has never set out any form of comprehensive list of the factors which it considers relevant to the exercise of its discretion under this particular rule. Further, the technology involved in electronic hearings is constantly evolving and, as discussed above, the advancing nature of technology has, potentially at least, reduced the significance of a number of factors which others have considered relevant in the past (particularly) in a decision dealing with electronic hearings by way of teleconference.

41. In addition, many of the decisions, of various other tribunals and/or arbitrators, which the Union relied upon involved relatively minor disputes and/or issues in which the (actual and/or anticipated) evidence was brief and did not relate to important issues of credibility, at least with respect to the particular witnesses in issue (see, for example; *Erickson v. Ontario (Ministry of Environment),* [2011] O.E.R.T.D. No. 7 (Case Nos. 10-121 and 10-122); and *Jarvis v. Kenora (District),* [2009] O.M.B.D. No. 326). Others involved situations where the parties had (apparently) agreed to hold the hearing, or to hear certain specific evidence, by way of video conference (see, for example, *High Level (Town) v. 896847 Alberta Ltd.,* [2008] A.M.G.B.O. No.

45; *Esterreicher v. Non-Marine Underwriters* [2008] O.F.S.C.D. No. 164; and *Athabasca University (Belcher Grievance)*, [1998] A.G.A.A. No. 112 (T. J. Christian). In addition, some decisions provided no descernable basis for the decision to proceed by way of video conference (see, for example, *Galal v. Northwestel Inc.*, [2010] C.L.A.D. No. 135). Accordingly, these cases are of no real assistance in determining the various factors to be considered in relation to this request.

42. Not withstanding the above noted comments concerning the utility of many of the decisions relied upon by the Union, certain decisions and other materials, provided by the Union are clearly of assistance. Specifically, Rule 1.08(5) of the Ontario Rules of Civil Procedure, which formed the basis for Rutherford J.'s decision in *Pack All, supra* provides the following list of factors which must be considered by the courts in determining whether to allow evidence to be given by way of video conference:

> [5] Ontario Rule 1.08(5) set out a list of factors to be considered in determining whether a witness' evidence should be permitted to be taken by video-conference. They are:
>
> Factors to Consider
>
> (5) In deciding whether to permit or to direct a telephone or video conference, the court shall consider,
>
> (a) the general principle that evidence and argument should be presented orally in open court;
>
> (b) the importance of the evidence to the determination of the issues in the case;
>
> (c) the effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;
>
> (d) the importance in the circumstances of the case of observing the demeanour of a witness;
>
> (e) whether a party, witness or solicitor for a party is unable to attend because of infirmity, illness or any other reason;
>
> (f) the balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and
>
> (g) any other relevant matter. O. Reg. 288/99, s. 2.

43. Further, the Human Rights Tribunal of Ontario essentially adopted the *Criminal Code* provisions in setting out the list of factors which it considered relevant to the exercise of its discretion to receive evidence by way of video conference in its decision in *Brandy Johnson, supra*:

> [32] The *Criminal Code* also assists in articulating, with appropriate modifications, some of the considerations that should inform the exercise of

> discretion by this Tribunal under the *Rules of Practice* and the *SPPA*. These include:
>
> a) the location and personal circumstances of the witness;
>
> b) the costs that would be incurred if the witness had to be physically present;
>
> c) the nature of the witness' anticipated evidence, including whether the credibility or reliability of the witness is in issue;
>
> e) the reasonable practicality of video or audio technology, and the costs associated with taking the evidence of a witness electronically. (Generally, it can be assumed that the costs associated with audio conferencing are minimal);
>
> f) the likelihood of any significant prejudice to the parties, particularly when it is proposed that the evidence be taken by telephone conferencing where the witness would not be seen by the parties or the Tribunal; and
>
> g) Prejudice could also arise from demonstrable practical difficulties which could undermine the ability to conduct full examinations and cross-examinations. For example, where the witness is expected to be taken through voluminous documentation, evidence taken electronically may be more problematic.

44. In terms of the Rule 1.08(5) factors, the Board emphasised the importance of the first of them, the general principle that evidence should be presented orally in open court, in its decision in *Hi-Teck Dev Inc., supra,* by stating the following:

> 35. In this case, the option of telephone conference or video conference is not particularly attractive. For the reasons identified above, I do not believe that the evidence to be heard from the four witnesses to date regarding Mr. Witkowski's observations on the application filing date would be fairly characterized as "brief". The situation in *The Board of Education for the City of Windsor* was different, because the substance of the evidence to be put to the two witnesses was very limited. Furthermore, based on the evidence to date, it appears that the credibility of all witnesses will be an important consideration. In that context, it is preferable that the testimony of all witnesses be taken in person, if at all possible.

45. However, by specifically including the modifying phrase *if at all possible* it is obvious that the Board clearly considered that there may be legitimate reasons to depart from this general principle and to allow for video conferences (even if the witness' evidence was likely to be long, complex and/or involve issues of credibility). Further, this same principle, involving as it does an analysis of the reason for potentially departing from the generally preferred in-person evidence, is, in effect, factor (e) of the Ontario Rules and, at least part of factor (a) of the HRTO's list of factors.

46. As the technology improves and becomes more readily available (and as legal institutions become more familiar with its use), it may well be that less extraordinary reasons will come to provide a sufficient basis for a request for the taking of evidence by way of video conference. The HRTO's decision in *Brandy Johnson, supra* would appear to be an example of this phenomenon. In that case, in which video conference evidence was allowed, Vice-Chair Sandler made clear that the reason for the request essentially related to convenience to the witness:

> [5] There is evidence before me that Ms Furey now resides in Iqaluit, Nunavut. She is employed as a Crown counsel in the Nunavut Regional Office of the Department of Justice. As one of 13 Crown counsel in that office, she has a demanding caseload, which requires her to travel frequently to and from Nunavut's 26 communities. Her affidavit filed in support of the motion reflects that it would be difficult and disruptive to her work schedule if she were required to travel to Toronto[1] to give *viva voce* testimony.

47. In this case it is not necessary to go as far as Vice-Chair Sandler did and find that the general preference for in-person evidence can be set aside in circumstances where travelling to the location of the hearing is *difficult and disruptive to a witness' work schedule.* Here, the reason for the Union's request has nothing to do with convenience but is rather that it is impossible for the witness to come to Toronto. There is no reason to believe that the Union would not arrange for Jaramillo to come to the Board, or that Jaramillo would refuse to come, if it was possible for him to do so but this is not the case as he is unable to legally re-enter Canada. Quite simply, it is hard to imagine a better or more persuasive reason for a request for a witness to testify by way of video conference and, accordingly, this factor weighs strongly in favour of granting the request.

48. I do, however, agree with Islington that, in reaching an ultimate decision, the reason for the Union's request (Jaramillo's inability to re-enter Canada) must be balanced against the underlying circumstance which caused this particular reason to arise in the first place. Specifically, Jaramillo is only in his current position (of not being able to re-enter Canada) because he voluntarily left Canada, while the judicial review application concerning his refugee status remained pending, knowing full well that by so doing he was making it virtually impossible for him to be able to return to this country. In view of this, Islington asserts that the Board should not exercise its discretion in favour of someone who is essentially the author of his own misfortune.

49. I accept that such an argument may be persuasive in certain circumstance but it is not significant in this case. In both of these matters the applicant is the Union, and not Jaramillo, and it is the Union's rights (and/or the collective rights of the employees in the bargaining unit which it seeks to represent) which are, primarily, in issue. Further, most (or at least the most significant) of the remedies which are being sought in these matters directly relate to the Union and its ability to represent employees of Islington. There is no suggestion that the Union even knew about, let alone encouraged or suggested, Jaramillo's decision to suddenly leave Canada and it is quite clear that the Union had no ability to make him stay in Canada against his will. Therefore, the fact that Jaramillo decided to leave the country when he did, and as a result cannot now return, is not a relevant factor in determining whether I should exercise my discretion in favour of this applicant,

the Union, although it may have been significant had Jaramillo himself been the applicant and if the matters before me had principally related to his, individual, rights

50. The second factor which the courts are required to consider under Rule 1.08(5) is the importance of the proposed evidence to the determination of the issues in the case. This is clearly a factor which the Board should always consider in any (second step) analysis under Rule 38.5. In this case, the significance of Jaramillo's evidence to the issues to be determined cannot be overestimated. As noted above, what must be determined in this case are the Union's allegations concerning violations of the Act by Islington and the effect of any proven violations upon the employees' abilities to freely select (or not select) a union. Almost all of (and certainly the most important of) the Union's section 96 allegations centre on Jaramillo. The Union's particulars and a great many of the questions which were put to Islington's witnesses (pursuant to the rule in *Browne v. Dunn*) confirm that the Union always intended to base a large part of its case on the testimony of Jaramillo (who also acted as the Union's advisor throughout the hearing to date). His evidence is, crucial to the issues to be determined and as such this factor weighs heavily in favour of granting the Union's request for an electronic hearing.

51. Further, from the perspective of the Board as a statutory tribunal, it is also important to evaluate the overall significance of the issues in dispute between these parties within the overall context of the Act. The right of employees to freely select a trade union to represent them in collective bargaining with their employer, and the right to do so without being subject to the threat of discharge, are arguably two of the most fundamental rights which lie at the heart of this Act. Accordingly, the significance of the issues in dispute in this matter (and for the determination of which Jaramillo's evidence is vital) within the overall scheme of the Act weighs heavily in favour of hearing his evidence, if at all possible.

52. Critical to the Board's final decision, under the second prong of the Rule 38.5 test, is a balancing of the competing harms which granting, or refusing to grant, a request for an electronic hearing will give rise to. As noted heretofore there may be some *harm* created by Jaramillo giving his evidence by way of video conference in this case which is long and complex, concerns significant issues of credibility and involves a number of exhibits which Jaramillo may be questioned about. However, and as set out above, such harm will be significantly reduced if adequate arrangements are made in advance and any harm which remains can be dealt with by way of the weight which is ultimately given to Jaramillo's evidence. In this respect, it is important to point out that the harm caused by proceeding by way of video conference will not, therefore, necessarily be visited exclusively upon Islington. Jaramillo's evidence and the Board's assessment of his credibility are central to the Union's case. Accordingly, the Union clearly runs the risk of having Jaramillo's evidence being accorded less weight, and/or its key witness being found to be less believable, as a result of the fact he testified electronically (and his cross-examination was therefore somewhat less direct than normal), from Colombia, and in circumstances where his attachment to Canada and its legal processes might be open to question.

53. Conversely, the harm which would be generated if Jaramillo is not able to testify is hugely significant and cannot be overcome or minimized. As noted above, if he does not give evidence, the Union would be without its most important witness (and its only witness with respect to many of its allegations). In essence, without the evidence of Jaramillo, this case would be all but over. As such, this specific consideration weighs very heavily in favour of the Union and, more generally, there is no question that the overall balancing of the various *competing harms*, present in these particular circumstances, also favours the granting of the Union's request

54. Finally, it is possible that in certain cases any *costs*, to the Board and/or the parties, of proceeding by way of electronic hearing may have to be considered. However, this is not such a case. Here the Union has agreed to (and in fact proposed) that it would pay all of the costs associated with holding a video conference and Islington has taken no issue with this.

55. It was for all of the above set out reasons that I issued my *bottom line* decision allowing Jaramillo to testify by way of video conference. However, and as also set out above, the specific arrangement of, including the technology to be used for, the video conference is very important. Accordingly, I hereby direct counsel for the Union, which is responsible for making these arrangements, to fully inform counsel for Islington as to all proposed aspects and details of the video conference arrangements and to consider (in good faith) any requests or suggestions concerning such proposed arrangements, which Islington may have, before they are finalized. In the event that the parties cannot agree on any specific arrangements concerning the video conference, they are to advise the Board which will thereafter determine any such disputes.

56. Finally, and as referred to above, it will be necessary for Jaramillo to have access to the existing, and potential, exhibits, but not to have access to, and/or not to refer to, any other materials and documents, when he gives his evidence. Based on the evidence/exhibits to date, and the issues in dispute, the various documents and materials which he might be questioned about, and therefore which must be available to him in Colombia, are potentially quite numerous. As many of the decisions which have considered electronic hearings have noted, insuring that a witness who is testifying electronically has access to the (correct) exhibits (or potential exhibits) at the appropriate times can potentially pose serious logistical problems. Accordingly, in the specific circumstances of this case, and in an effort to insure that Jaramillo's testimony (and particularly his cross-examination) proceeds efficiently and without undue interruptions and delays, I hereby direct the Union to retain counsel in Colombia, who speaks, understands, and reads English (or alternatively to arrange for a member of its Toronto law firm to travel to Colombia). Copies of all of the documents and other materials which might potentially be put to Jaramillo by either party are to be provided to such counsel in advance of the video conference, and counsel for the Union (in Toronto) and counsel for Islington are directed to cooperate with each other to insure that this occurs. Thereafter, the Union's counsel in Colombia is to attend at the video conference, with all of the copies so provided, in order to assist the Board (and the parties) in insuring that Jaramillo is shown the appropriate documents/materials at the appropriate times and in insuring that he is not using or consulting any other documents or materials, when giving his evidence.

2567-09-U; 2771-09-R Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. **Islington Nurseries Limited**, Responding Party; Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. Islington Nurseries Limited, Responding Party

Certification – Construction Industry – Reasonable Apprehension of Bias – Unfair Labour Practice – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-

Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues

BEFORE: *Bernard Fishbein*, Chair.

DECISION OF THE BOARD; October 17, 2011

1. This is an application for certification and an unfair labour practice complaint under section 96 of the *Labour Relations Act* ("the Act") between the Universal Workers Union, Labourers' International Union of North America Local 183 ("the Union") and Islington Nurseries Limited ("the employer"). These proceedings have been strongly contested and have already consumed 9 days of hearing. They are re-scheduled for hearing on November 4, 24 and 25, 2011. Neither party expects that the matters will be completed in those hearing days and that further hearings will be required which will likely take the case well into 2012.

2. The previous hearing days were presided over by Vice-Chair Mark Lewis who resigned from the Board effective October 7, 2011. There is no dispute that following his resignation from the Board, Mr. Lewis will assume some position, apparently as counsel, with the United Brotherhood of Carpenters and Joiners of America.

3. Section 110(7) of the Act specifically provides:

> If a member of the Board resigns or his or her appointment expires, the chair of the Board may authorize the member to complete the duties or responsibilities and exercise the powers of a member in connection with any matter in respect of which there was a proceeding in which he or she participated as a member.

In view of the lengthy number of days of hearing that have already taken place, I have authorized Mr. Lewis to continue to preside over these cases. Mr. Lewis, notwithstanding the disruption to his personal affairs that will undoubtedly impose following his resignation from the Board, has agreed to do so.

4. The parties were advised of this and invited to make any comments they may have.

5. The Responding Party Employer ("the Employer") has written to the Board objecting to Mr. Lewis continuing to preside over the hearing:

> "As Mr. Lewis' tenure as in-house counsel for the Carpenters lengthens, he will more and more be cloaked with the mantle of 'union counsel'. I would therefore suggest that while he may not be closely tied to the specific issues in dispute in this particular case, it is not unexpected that he will be closely tied with the trade union perspective."

As a result, the Employer submits that there is a reasonable apprehension of bias on the part of Mr. Lewis.

6. The Applicant ("the Union") opposes this request and the Employer has now responded to those submissions by the Union.

Background of the Ontario Labour Relations Board ('the Board")

7. This Board administers and adjudicates disputes that arise under labour relations regime in Ontario pursuant to the *Labour Relations Act, 1995,* R.S.O. 1995, c.1, as amended (the "Act"). The Board has jurisdiction under other employment related Acts as well. Hearings are presided over by Vice-Chairs who increasingly, over the years, sit alone. Throughout its history, virtually all of the Vice-Chairs of the Board have been drawn from the private practice of labour and employment law. The nature of this professional practice is that practitioners virtually always represent either trade unions or management/employers and generally do not represent both. This has been so for decades.

8. Considering the sophistication and complexity of modern labour law as it has evolved, to say nothing of the implications of the decisions the Board makes not only on the parties, but the economy of the province as well, not surprisingly, the labour relations community not only expects but demands that the Vice-Chairs of the Board have considerable knowledge and expertise in labour law. So does the Government of Ontario (Vice-Chairs are Order-in-Council appointments made by the Lieutenant Governor). As a result of both the need and expectation of such expertise, virtually all Vice-Chairs have practiced labour law prior to their arrival at the Board and because of the nature of such a practice, generally exclusively for one side or the other.

9. Moreover, unlike judicial appointments, appointments as Vice-Chairs are not lifetime appointments nor are they remunerated at the same level as judicial appointments. In fact, the current iteration of the Government of Ontario Appointees Directive specifically provides that the maximum length of appointment is 10 years in total (which includes an initial appointment of 2 years, a possible reappointment for 3 years and a possible final appointment for 5 years). In other words, the process specifically and deliberately envisages those who serve as Vice-Chairs ultimately leaving the Board and returning to gainful employment. It would surprise no one that Vice-Chairs have left the Board after their appointment has concluded and returned to the private practice of labour law, an area in which they obviously hold considerable expertise and experience.

10. The mere interchange of Vice-Chairs between the private practice of law and the Board or ultimately their return to the private practice of law has never been found to form the basis of a reasonable apprehension of bias. (I would note that this is not a case where Mr. Lewis would continue to preside over a case involving his future employer or its affiliates. Mr. Lewis immediately ceased presiding over such cases. Such cases will be handled otherwise than pursuant to section 110(7) of the Act.)

11. Unfortunately, the nature of labour law being what it is, this regular occurrence has still raised occasional challenges on the basis of an apprehension of bias on the part of adjudicators. Those challenges have been regularly rejected by the Board and the Courts. In *Marques v. Dylex Ltd.*, (1977) 81 D.L.R. (3d) 554 (cited with approval by the Board in *Metropolitan Plumbing and Heating Contractors Association*, [1986] OLRB Rep. Aug. 1104 - the very case the Employer referred the Board to), the Divisional Court stated at pages 565-567:

...

> Further, on a more general plane, the nature and function of the Board itself have to be regarded. The fact that a judge in similar circumstances would not, I would think, have heard the case is not determinative. (In saying this, I am not expressing an opinion on minimum legal standings.) **We can take judicial notice, if it is not apparent from the Labour Relations Act itself, that members of the Labour Relations Board and in particular the chairmen of panels will have had experience and expertise in the law and labour relations. The Government of Ontario looks to people with such a background in making appointments. Most, if not all those appointed, are bound to have some private association with parties coming before the Board.** In this connection the remarks of Mr. Justice Hyde in *R. v. Picard et al., Ex p. Int'l Longshoremen's Ass'n, Local 375* (1968), 65 D.L.R. (2d) 658 at p. 661, [1968] Que. Q.B. 301, are apposite:
>
> The only basis for any apprehension of bias submitted by appellant is that Commissioner Picard had been consulted more than a year before his appointment as Commissioner by Aluminium Limited, which is a company which controls one of the parties before the Commission, namely, the respondent Saguenay Shipping Ltd. ... I am quite unable to anticipate a biased approach by Commissioner Picard on the ground raised by the appellant. **Professional persons are called upon to serve in judicial, quasi-judicial and administrative posts in many fields and if Governments were to exclude candidates on such a ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought.**
>
> (emphasis added)

12. Furthermore, the test for reasonable apprehension of bias as enunciated in the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board*, (1976) 68 D.L.R. (3d) 716; [1978] 1 S.C.R. 369 at p. 394 is that of a reasonably informed person in the circumstances:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude'.

Although this oft-repeated quote actually comes from the dissent of Mr. Justice de Grandpré, it is frequently cited as reflecting the state of the law. See for example *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 46. To therefore paraphrase the words of the Court, I am of the view that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment.

13. The Employer concedes that this is the prevalent jurisprudence with respect to people who have come from private practice to the Labour Board. The Employer suggests that those cases are different because Vice-Chairs are "purged" by a period of time in which they do not preside over cases either involving their former clients or their former law firm. In fact, Vice-Chair Lewis, in his last position before coming to the Board, was the General Counsel of the Union in these cases, and prior to that, a member of the law firm that appeared as counsel to the Union in these cases and this was not the subject of any attack by the Employer on the basis of reasonable apprehension of bias basis. Nor could it have been. In fact, for the sake of the record, before being appointed Chair of the Board, I not only practised as a union labour lawyer but on many occasions represented the Union, although I had not done so for many years.

14. The Employer argues, however, that this is a different situation because the apprehension of bias relates to Vice-Chair Lewis' work after he leaves the Board in a case which will take several months to conclude. In my view, this is a distinction without a difference. It is difficult to conceive how Mr. Lewis' prior association with the very applicant and the very law firm involved in this application did not give rise to a reasonable apprehension of bias, but his association with a completely different trade union completely unrelated to this application, would.

15. Section 110(7) of the Act is clearly intended for situations exactly like this to prevent cases being compelled to start *de novo* with the consequential waste of time and resources. Notwithstanding how long it has taken to litigate this case until now, expeditious outcomes (or as expeditious as possible) are still particularly important in the area of labour relations where it is frequently said that labour relations delayed is labour relations denied. In fact, in *Embee Properties Ltd.*, [2002] OLRB Rep. November/December 1056, the case referred to us by the Union, the option of having the resigning Vice-Chair continue to hear the case (which was the most optimal) was not pursued, simply because the resigning Vice-Chair was not prepared to continue to do so.

16. More importantly, what are the consequences of such a position? If the Employer is correct, the option of section 110(7) would never be available to the Board in any case where the departing Vice-Chair would return to the private practice of labour law because that Vice-Chair would inevitably be either representing management or labour and therefore would be "closely tied" with the perspective of that side giving rise to a reasonable apprehension of bias according to the argument of the Employer. In other words, if the argument of the Employer is correct, it

would lead to section 110(7) being available only when the resigning Vice-Chair were retiring from all employment or being employed in an area completely unrelated to labour law – the very area where the Vice-Chair had earned his/her livelihood and developed considerable expertise for some considerable time beforehand. In my view, not only is such an interpretation or application of section 110(7) unwarranted and unreasonable, but it is not, in the words of the Supreme Court of Canada, "viewing the matter realistically and practically".

17. To accept the underlying premise of the Employer's argument, namely, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because that Vice-Chair works for a trade union is not reasonable and is rejected. Moreover, it is not workable in an area such as the *Labour Relations Act* under the current Act and the current method of appointments to the Board. Lastly, in a community that not only expects but demands a high level of expertise and real life experience that can be gained only from exposure to and practice in the subject matter of the Board's disputes, it is simply not acceptable.

18. Accordingly, the Employer's motion to have these cases continue before someone other than Vice-Chair Lewis is rejected. The Board would observe that this decision is made for the institutional and jurisprudential reasons outlined above. It is not made on the basis of either parties' handicapping as where they were at the particular stage of the hearing and who would gain or lose most by having the case commence *de novo*. Those submissions by the parties can most kindly be called purely speculative and were of no assistance to the Board.

3536-10-ES Meridian Lightweight Technologies Inc., Applicant v. Mike Radan and Director of Employment Standards, Responding Parties

Employment Standards – Discharge – The employer applied for review of an Employment Standards Officer's determination that it owed termination pay in lieu of notice – The company policy in place provided for the retention of an employee's seniority and recall rights for eighteen months in the event of layoff – The employee received a letter described as a "required written notice of termination/indefinite layoff" – Nine months later, the employer sent the employee another letter asking the employee to choose whether he would receive his severance pay or defer receiving the payment and maintain his seniority and recall rights – The employee chose to receive his severance pay at that time – This claim was filed two months later – The employer submitted that the initial letter constituted notice of termination and thus no termination or vacation pay was owed – It argued that based on the plain language of the Act, where an employer lays an employee off without specifying a recall date, the layoff is considered to be a termination when it exceeds a "temporary layoff" – The Board found that the employee was terminated pursuant to section 56(1)(c) of the Act, when his layoff lasted longer than the period defined by the Act as a temporary layoff – Furthermore, s. 56(5) of the Act deemed the termination to have occurred on the first day of the lay-off – The Board found that the initial letter given to the employee stated that it was a written notice of termination pursuant to the Act – The Board did not read the Act as precluding non-union employers from "setting off" the notice period in the same circumstances as their unionized counterparts where they give notice of termination prior to a layoff without a recall date or "indefinitely" – The Board found that

the initial letter constituted the requisite notice of termination and that the employer did not owe any termination pay – Application granted

BEFORE: *Christine Schmidt*, Vice-Chair.

APPEARANCES: *Peter Thorup, Sarah Britton* and *Zoe Kennedy* appeared on behalf of the applicant; *Mike Radan* appeared on his own behalf; *Linda H.C. Chen, Sarah Charow* and *Robin Lostracco* appeared on behalf of the Director of Employment Standards.

DECISION OF THE BOARD: October 27, 2011

1. This is an employer application under section 116 of the *Employment Standards Act, 2000,* S.O. 2000, c.41, as amended (the "Act") for review of an Employment Standards Officer's ("the ESO") determination that the applicant employer, Meridian Lightweight Technologies Inc. ("Meridian" or the "employer") owed wages (five weeks of termination pay in lieu of notice plus vacation pay on termination pay) to the responding party employee ("Mr. Radan"). The Order to Pay issued on December 20, 2010 in the amount of $4,147.00.

2. The parties agree that the issue before the me is whether Meridian, by its correspondence to Mr. Radan on November 7, 2008, provided notice of termination to him, such that it met its statutory obligation pursuant to the Act. Meridian argues that having given Mr. Radan the requisite notice of termination, no termination pay (or vacation pay thereon) is owing to him.

3. The relevant facts are undisputed. Mr. Radan worked as a general labourer for Meridian, a large employer, commencing in August 2003. He earned an hourly wage of $18.75. He was a non-union employee. The company policy at Meridian that applied to Mr. Radan provided for the retention of his seniority and recall rights for eighteen (18) months in the event of layoff. It also provided for continued benefit coverage for one month following the month of layoff.

4. On Friday, November 7, 2008, Meridian provided the following correspondence to Mr. Radan:

> November 7, 2008
>
> Hand Delivered - Production Employee
>
> Mike Radan
> 1879
> Days
> 452
>
> Dear Mike:
>
> We regret to inform you that you will be laid off indefinitely, within the meaning of the Employment Standards Act effective December 12, 2008
>
> This letter constitutes the required written notice of termination/indefinite layoff as per the Employment Standards Act.

> You are required to work your regularly scheduled shifts from November 10, 2008 to December 12, 2008 inclusive.
>
> In addition, if you have five (5) or more years of service prior to your last day of employment, you will be eligible to receive statutory severance pay (one week's regular pay per year of service) if your layoff equals or exceeds thirty-five (35) weeks.
>
> Employee benefits shall continue for one (1) month following the month of layoff as per company policy.
>
> All final regular earnings for time worked, vacation pay and your record of employment will be available to you on December 18, 2008.
>
> We wish to thank you for your contributions to Meridian and to wish you the best of luck with future endeavors.
>
> Dan Biggs — Production Superintendent
> Sarah Britton — Manager, Human Resources

5. Between Monday, November 10, 2008 and Friday, December 12, 2008, Mr. Radan continued to work his regular shifts. Mr. Radan received a Record of Employment which stated "shortage of work" as the reason for issuance.

6. In January 2009, Mr. Radan sought clarification regarding what he refers to as his "recent layoff," including the length of the recall period and whether laid off employees were eligible to apply for positions posted during the layoff. To this query, Meridian promptly replied, referring to the eighteen (18) month recall period pursuant to company policy and informing him that he would be eligible to apply for any positions posted.

7. On August 4, 2009, Meridian wrote to Mr. Radan:

> August 4. 2009
>
> Mike Radan
> [address removed]
>
> Dear Mike.
>
> By letter dated November 7 2008, you were notified of your layoff. The Ontario *Employment Standards Act, 2000* requires that where a layoff equals or exceeds 35 weeks, severance pay may become payable. Severance pay amounts to one week's regular straight time pay per year of service, including pro-rata amounts for completed months of service for employees with 5 or more years of service, to a maximum of 26 weeks of severance pay. Your entitlement is 5.30 weeks which equates to $3.976.08
>
> In your case, the 35 week period will be up effective August 17, 2009. The *Employment Standards Act, 2000* further allows you an option to receive your severance pay or defer receiving these payments and maintain your seniority and recall rights.

If you elect to defer receiving your severance pay, that amount is to be paid to the Ministry of Labour, Employment Stardards Branch in trust. If you are later recalled and then return to work, no severance is then owing and the money is refunded to the employer. If you are not recalled you can later elect to receive your severance pay at a later date upon abandoning any seniority and recall rights. In addition, if your seniority rights automatically cease after 18 months of layoff, the severance pay would then also be payable by the government.

At this point there have been no new significant developments one way or the other with respect to the facility. This letter should not be taken as a notice of permanent closure, but rather we are writing this letter to communicate about the Employment Standard requirements.

In order to comply with these government regulations we would ask you to indicate in writing to us whether you now wish to receive your severance pay, recognizing that your seniority rights cease or whether you wish to defer your entitlement and retain your seniority rights as per company policy for up to 18 months of layoff. Please complete the attached Severance Pay Election and Release form and send it via registered mail to Sarah Britton, Human Resources Manager.

If you elect to receive a lump sum payment for your severance now, you may either choose to receive a cheque to the extent allowed by Revenue Canada less all statutory deductions or have the full severance amount transferred to a Registered Retirement Savings Plan (RRSP). If you choose the RRSP option, please provide us with a copy of your RRSP deduction limit statement form. If you do not provide this RRSP information (or other reasonable confirmation) then tax deductions must be made.

If you do not elect to receive a lump sum payment from us at this time and instead wish to maintain your recall rights, your severance pay will then to be paid in trust to the Ministry of Labour, Employment Standards Branch. Please sign and return the attached Severance Pay Declaration form. All tax will be deducted before it is sent to the Ministry, unless you make an irrevocable election to have the Ministry later pay your severance directly into your RRSP.

Finally, the *Employment Standards Act, 2000* stipulates that if an employee fails to make an election on receiving or deemed severance pay, the employee is deemed to elect to defer receiving their severance pay. We would ask that you ensure that we receive your response no later than August 28, 2009. If we have not heard from you by August 28, 2009, we will be required by the government regulations to assume that you wish to maintain a right of recall and defer any severance pay entitlement.

If there are any questions, please contact the writer.

Yours sincerely.
Sarah Britton
Manager, Human Resources

8. Following receipt of the August 4, 2009 correspondence, Mr. Radan, on August 29, 2009, elected to receive severance pay as a lump sum payment less applicable tax deductions,

thereby abandoning the seniority and recall rights he had pursuant to Meridian's company policy. Mr. Radan received severance pay at that time.

9. On October 19, 2009, Mr. Radan filed a claim for termination pay and vacation pay thereon with the Ministry of Labour ("MOL"). This application followed the Order to Pay wages issued by the ESO on December 20, 2010.

The Act

10. The sections of the Act and Regulations referred to by the parties are reproduced in Appendix "A" attached to this decision.

Positions of the Parties

Meridian's Position

11. Meridian submits that the correspondence dated November 7, 2008 addressed to Mr. Radan provides notice to him that his employment would be terminated in five weeks on December 12, 2008. It refers the Board to sections 54, subsections 56 (1), (2), (4) and (5), section 57 of the Act, as well as section 4(1) of *Regulation 288*.

12. Based on the plain language of the Act, Meridian asserts that where an employer lays an employee off without specifying a recall date, as it did here, the layoff is to be considered a termination where it exceeds "a temporary layoff."

13. Meridian submits that to the extent that the ESO found the November 7, 2008 correspondence to be a notice of "temporary layoff" it was unreasonable do so as the letter clearly refers to "termination" and nowhere in the letter is there reference to the layoff being "temporary."

14. Meridian submits that *Regulation 327*, referred to by the ESO in his decision, which deemed a notice of indefinite layoff to be a notice of termination, has no application having been repealed in 2001, and is irrelevant. As such, Meridian argues the previous Regulation cannot be used to interpret the notice of termination delivered to Mr. Radan to be a notice of "temporary layoff." In support of its position, Meridian reminds the Board that there is no obligation under the Act to provide employees with notice of layoff, whereas there is an obligation to provide notice of termination.

15. In oral argument, Meridian articulated that it was "safe to assume" that the drafting of the critical letter and in particular the inclusion of the term "indefinite layoff" in it was attributable to a form the employer would have used prior to the repeal of *Regulation 327*. Given the amendment to the Regulation, the wording "indefinite layoff" in the November 7, 2008 letter, really should not have been included in the letter. This, Meridian states, caused confusion. Meridian urges the Board to read the letter as having included a fixed termination date – that of December 12, 2008.

16. If the November 7, 2008 letter does not constitute notice of termination with a fixed date, Meridian submits that by operation of section 56(1)(c) of the Act, Mr. Radan's layoff became a termination after he was not recalled to work within the statutorily defined time frames

set out in section 56(2) of the Act. In such a circumstance, the effective date of Mr. Radan's termination is deemed to be December 12, 2008, pursuant to section 56(5) of the Act. Meridian's argument is that either way, with a fixed termination date or a deemed termination date pursuant to the Act, the requisite notice was given in the November 7, 2008 letter.

17. Lastly, Meridian submits that severance became payable to Mr. Radan after 35 weeks of layoff pursuant to section 63(1)(c) of the Act. At that time, Mr. Radan made an election to be paid severance pay, having retained seniority and recall rights up to that point. Meridian reminds the Board that entitlements and obligations relating to termination pay and severance pay are independent of one another. Further, it cautions against adopting the Director of Employment Standards' position, outlined below. To do so, Meridian states, would discourage non-union employers from adopting polices with provisions for seniority rights and the retention of recall rights.

Position of the Director of Employment Standards ("DES")

18. The DES argues that regardless of the wording of the November 7, 2008 letter, it does not amount to a notice of termination as required by section 54 of the Act. The letter, the DES asserts, cannot be both a notice of layoff and a notice of termination with an effective date of December 12, 2008 within the legislative scheme. In Mr. Radan's case, the DES asserts the notice is clearly one of layoff (with no specific recall date).

19. By way of background, the DES provides context to the legislative scheme. In the now repealed *Regulation 327*, an "indefinite layoff" is deemed to be notice of termination of employment. In *Regulation 288*, the Regulation currently in force, employers bound by a collective agreement (not the case here) may provide written notice of "indefinite layoff" when laying off an employee for a period that will or may be longer than a "temporary layoff" and the employer would or might be in breach of the collective agreement if they advised the employee that their employment was to be terminated. In this context only, the date of the notice of indefinite layoff is also deemed to be a notice of termination. According to the DES, for non-unionized employees such as Mr. Radan, the Act contemplates a layoff being "temporary" or a termination if it exceeds the time thresholds set out in section 56(2). The DES refers to section 56(4) of the Act, which it states provides for the specific circumstances in which Meridian found itself with Mr. Radan – laid off without a recall date. The provision states that in such circumstances, an employer "shall not be considered to terminate the employment of the employee, unless the period of lay-off exceeds that of a temporary lay-off."

20. The DES points out that if Mr. Radan was terminated on December 12, 2008, as asserted by Meridian, as well as laid off at that time, then he would have been entitled to severance pay at that point, not thirty-five (35) weeks later.

21. The DES submits that Meridian's letter to Mr. Radan of November 7, 2008, clearly a notice of layoff to Mr. Radan, cannot be "set off" against Meridian's obligation to provide him with notice of termination or pay in lieu of such notice. The DES relies on an excerpt from the Ministry of Labour's Policy and Interpretation Manual, which states:

19.4 – Section 56

19.4.1 - What Constitutes Termination, s. 56(1)

(c) The employer lays the employee off for a period longer than the period of temporary lay-off

The provision states that a lay-off that exceeds the period of a "temporary lay-off' is a termination. Section 56(2) defines a "temporary lay-off'. ... .As this section provides that a lay-off is a termination only where the period of lay-off exceeds that of a temporary lay-off, it follows that a temporary lay-off is not a termination and that there is therefore no obligation under the Act to give an employee notice of a temporary lay-off. If an employer does provide notice of lay-off and the lay-off ultimately lasts longer than a temporary lay-off and is subsequently deemed to be a termination, the notice of lay-off cannot generally be set-off against the employer's notice of termination obligations.

This last point represents a significant change from Program policy under the former *Employment Standards Act*. Under s. 8(3) of Reg. 327 under the former Act, notice of indefinite lay-off (that is, a notice of lay-off that did not specify a recall date) was deemed to be a notice of termination. As a consequence, it was Program policy that where an employee was given proper advance notice of the indefinite lay-off, the employer's notice of termination obligations were met. Under the *Employment Standards Act, 2000*, however, the corresponding provision that would permit notice of indefinite lay-off to fulfil the employer's notice of termination obligations (s. 4(2) of Reg. 288/01) is restricted in its application to situations where an employer would be in breach of a collective agreement if it advised employees that their employment was being "terminated". This allows an employer bound by such a collective agreement and who anticipates that a lay-off that it is about to implement will end up resulting in termination *for the purposes of the Act*, to satisfy the Act's notice requirements by giving notice of indefinite lay-off. See section 19.22.2 of the Manual for a discussion of s. 4(2) of Reg. 288/01.

It should be noted that while a lay-off that lasts no longer than the period of a temporary lay-off will not be considered a termination under clause 56(1)(c), if the employee's employment contract does not provide, either expressly or by implication (which could be based on past practice, common understandings or custom in the industry or trade concerned) that he or she may be laid off, a lay-off, even one that would be considered temporary under subsection 56(2), may constitute a constructive dismissal; in that case, if the employee responds to the lay-off by quitting (and does so within a reasonable period), the situation will be treated as involving a termination by the employer pursuant to clause 56(1)(b). (See discussion of the Ontario Court of Appeal decision in *Stolze v. Addario*.)

22. The DES also refers the Board to section 2(1)2 of the current Regulation in support of its submission. That provision precludes an employee "on temporary layoff" from entitlement to notice of termination or termination pay. The DES submits that on the facts here, Mr. Radan was temporarily laid off until he met the threshold for termination established by section 56(1)(c) of the Act.

Mr. Radan's position

23. In addition to relying on the DES' submission, Mr. Radan submitted the letter of November 7, 2008, his subsequent inquiries to his employer (and its response), and the letter of August 2009, as pointing to his continued relationship with the employer and to the fact that the letter was a notice of his impending layoff on December 12, 2008.

Decision

24. As stated at the outset of this decision, the issue before me is whether the letter provided to Mr. Radan on November 7, 2008 constituted notice of termination to him such that Meridian is relieved of its obligation to pay him termination pay in accordance with the Act. The parties agree that I am not bound by the ESO's decision or its reasoning. Neither am I bound by the Ministry's Interpretation Manual. The question before me is one of interpretation of the Act and *Regulation 288* in the face of undisputed facts.

25. The key sentences of the November 7, 2008 ("critical letter") letter are reproduced below for convenience:

> We regret to inform you that you will be laid off indefinitely, within the meaning of the Employment Standards Act effective December 12, 2008
>
> This letter constitutes the required written notice of termination/indefinite layoff as per the Employment Standards Act.
>
> You are required to work your regularly scheduled shifts from November 10, 2008 to December 12, 2008 inclusive.

26. It would appear that the letter was drafted with the previous regulation – *Regulation 327* – in mind. Under section 8(3) of the revoked *Regulation 327*, a notice of indefinite layoff was deemed a notice of termination of employment.

27. On September 4, 2001, however, Bill 147 repealed the former Act and simultaneously brought into force the current one. Coinciding with the former Act's repeal, *Regulation 327* was revoked and replaced with *Regulation 288*. In the current Act and Regulation there is no equivalent to section 8(3) of the now repealed *Regulation 327*. Section 56(4) of the Act now expressly states that an employer who lays off an employee without specifying a recall date shall not be considered to have terminated the employee's employment, unless the layoff period exceeds that of a temporary layoff. In addition, in the current Regulation, *Regulation 288,* the term "indefinite layoff" is used only in reference to employers covered by collective agreements. Specifically, section 4(2) of *Regulation 288* allows such an employer who will be or is laying off an employee for a period longer than a temporary layoff, and who would or otherwise might be in breach of a collective agreement if it advised that the employee's employment was to be terminated, to provide a written notice of indefinite layoff and to have that notice be deemed a notice of termination.

28. Section 56(1) of the Act sets out the three ways which an employer can terminate employment:

> (a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;
>
> (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period; or
>
> (c) the employer lays the employee off for a period longer than the period of a temporary lay-off.

29. Meridian laid off Mr. Radan on December 12, 2008. Meridian did not specify a recall date to Mr. Radan when it laid him off. Therefore, pursuant to section 56(4) of the Act Meridian is not considered to have terminated Mr. Radan at that time. Had Mr. Radan been terminated on the anticipated date of December 12, 2008, as had been Meridian's intention, he would have been terminated pursuant to section 54(a) of the Act. He would have been severed at the same time by operation of section 63(1)(a) of the Act. This would have in turn triggered an obligation on December 12, 2008 to pay severance pay to Mr. Radan pursuant to section 64 of the Act.

30. The facts in this case dictate that Mr. Radan was terminated pursuant to section 56(1)(c) of the Act. More specifically, Mr. Radan was terminated when his layoff lasted more than the period defined by the Act as a temporary layoff. It is undisputed that Mr. Radan's layoff exceeded the period defined in the Act.

31. By operation of section 56(5) the Act, Mr. Radan's employment was then deemed to be terminated on the first day of the layoff, December 12, 2008:

> (5) If an employer terminates the employment of an employee under clause (1)(c), the employment shall be deemed to be terminated on the first day of the lay-off.

32. I therefore find that Mr. Radan was deemed to be terminated on the first day of the layoff, December 12, 2008, by operation of subsections 56(1)(c) and (4) and (5) of the Act. His employment was severed, for the purpose of severance pay, pursuant to section 63(1)(c) once Mr. Radan was laid off for 35 (thirty-five) weeks.

33. The DES says that the letter of November 7, 2008 cannot constitute both a notice of layoff and a notice of termination pursuant to the Act. The letter specifically states that it is written notice of termination pursuant to the Act. The DES relies on the Ministry's Interpretation Manual in support of its position. It relies on the fact that reference to "indefinite layoff" in section 4(2) of *Regulation 288*, and the deeming of a notice of "indefinite layoff" to be a notice of termination, only applies where an employer is bound by a collective agreement. Section 8(3) of the repealed *Regulation 327* applied to unionized and non-unionized employers and deemed a notice of indefinite layoff to be a notice of termination of employment.

34. The repeal of *Regulation 327* and its replacement by *Regulation 288*, contrary to the DES's position, does not suggest, in my view, that section 4(2) of *Regulation 288* operates to preclude non-union employers from giving notice of termination to employees who are being laid off without a recall date or "indefinitely." Rather, section 4(2) of *Regulation 288* simply protects employers covered by collective agreements from inadvertent breach of the just cause standard for discharge by complying with the Act's notice of termination provisions.

35. Worth noting is that section 56(5) of the Act does not import the language from its equivalent provision in section 8(4) of *Regulation 327*:

> (4) Where a person who has been laid off is no longer temporarily laid off as defined in this Regulation, the employment of that person shall be deemed to have been terminated upon the first day of the lay-off and the employer shall pay to that person an amount calculated in accordance with subsection 57(14) of the Act, as though the employment of the person had been terminated forthwith without notice.

36. As such, I do not read the Act as precluding non-union employers from "setting off" the notice period in the same circumstances as their unionized counterparts where they give notice of termination prior to a layoff without a recall date or "indefinitely." Had Mr. Radan been recalled during the statutorily defined period of temporary layoff in the Act, the notice referenced in the November 7, 2008 letter, would not have taken effect. Interpreting the Act to permit an employer to give notice of termination in circumstances of a layoff without a recall date serves the purpose of notice of termination contemplated by the legislative scheme.

37. Finally, the DES pointed to section 2 in *Regulation 288* in support of its position. I do not find the section to be of assistance. It speaks to an employee's lack of entitlement to notice of termination or termination pay during the statutorily defined period of a temporary layoff. The section is silent on the issue of whether an employer can, prior to the commencement of a layoff, give notice of termination.

38. For all of these reasons, I find the letter of November 7, 2008, constitutes the requisite notice of termination to Mr. Radan such that Meridian did not owe him termination pay as decided by the ESO. The application is allowed.

APPENDIX "A"

PART XV
TERMINATION AND SEVERANCE OF EMPLOYMENT

TERMINATION OF EMPLOYEMENT

54. No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer,

(a) has given to the employee written notice of termination in accordance with section 57 or 58 and the notice has expired; or

(b) has complied with section 61.

55. Prescribed employees are not entitled to notice of termination or termination pay under this Part.

56. (1) An employer terminates the employment of an employee for purposes of section 54 if,

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;

(b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period; or

(c) the employer lays the employee off for a period longer than the period of a temporary lay-off.

(2) For the purpose of clause (1)(c), a temporary layoff is,

(a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;

(b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,

(i) the employee continues to receive substantial payments from the employer,

(ii) the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,

(iii) the employee receives supplementary unemployment benefits,

(iv) the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,

(v) the employer recalls the employee within the time approved by the Director, or

(vi) in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or

...

(4) An employer who lays an employee off without specifying a recall date shall not be considered to terminate the employment of the employee, unless the period of the lay-off exceeds that of a temporary lay-off.

(5) If an employer terminates the employment of an employee under clause (1)(c), the employment shall be deemed to be terminated on the first day of the lay-off.

57. The notice of termination under section 54 shall be given,

...

(e) at least five weeks before the termination, if the employee's period of employment is five years or more and fewer than six years;

...

...

61. (1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,

(a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and

(b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive.

...

SEVERANCE OF EMPLOYMENT

63. (1) An employer severs the employment of an employee if,

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee;

(b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response within a reasonable period;

(c) the employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks;

(d) the employer lays the employee off because of a permanent discontinuance of all of the employer's business at an establishment; or

(e) the employer gives the employee notice of termination in accordance with section 57 or 58, the employee gives the employer written notice at least two weeks before resigning and the employee's notice of resignation is to take effect during the statutory notice period.

...

64. (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and,

(a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or

(b) the employer has a payroll of $2.5 million or more.

...

Regulation 288/01 – Termination and Severance of Employment, at all relevant times provided:

2. (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

....

2. An employee on a temporary lay-off.

...

4. (1) Subject to section 5, a notice of termination shall be,

(a) given in writing;

(b) addressed to the employee whose employment is to be terminated; and

(c) served personally or in accordance with section 95 of the Act.

(2) If an employer bound by a collective agreement is or will be laying off an employee for a period that will or may be longer than a temporary lay-off and the employer would be or might be in breach of the collective agreement if the employer advised the employee that his or her employment was to be terminated, the employer may provide the employee with a written notice of indefinite lay-off and the employer shall be deemed as of the date on which that notice was given to have provided the employee with a notice of termination.

Regulation 327 (revoked on the day Part XV of the *Employment Standards Act, 2000* came into force) states:

"temporary lay-off" means,

(a) a lay-off of not more than thirteen weeks in any period of twenty consecutive weeks,

(b) a lay-off of more than thirteen weeks where,

(i) the person continues to receive payments from the employer,

(ii) the employer continues to make payments for the benefit of the person laid off under the provisions of a *bona fide* retirement or pension plan or under a *bona fide* group or employee insurance plan,

(iii) the person laid off receives supplementary unemployment benefits, or

(iv) the person laid off is entitled to be in receipt of supplementary unemployment benefits but does not receive the same because he or she is employed elsewhere during the lay-off, or

(c) a lay-off of more than thirteen weeks where the employer recalls the person within the time or times fixed by the Director;

"termination of employment" includes a lay-off of a person for a period longer than a temporary lay-off;

...

8. (1) Notice of termination of employment shall be in writing addressed to each person whose employment is to be terminated and shall be served personally or by registered mail.

(2) Notice of termination of employment may be made conditional upon the happening of a future event provided that the length of the notice complies with the Act and this Regulation.

(3) Notice of indefinite lay-off shall be deemed to be notice of termination of employment.

(4) Where a person who has been laid off is no longer temporarily laid off as defined in this Regulation, the employment of that person shall be deemed to have been terminated upon the first day of the lay-off and the employer shall pay to that person an amount calculated in accordance with subsection 57 (14) of the Act, as though the employment of the person had been terminated forthwith without notice.

1955-11-M Amalgamated Transit Union, Local 1587, Applicant v. **Metrolinx**, Responding Party

***Crown Employees Collective Bargaining Act* – Duty to Bargain in Good Faith – Essential Services – The parties disagreed about whether a valid essential services agreement (ESA) within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made**

BEFORE: *James Hayes*, Vice-Chair.

APPEARANCES: *Ian Fellows, Dean Ardron, Ray Doyle, Danny Harris, Peter Brown, Sean Wilson, Chris Jukutis, Ron Guy* appearing for Amalgamated Transit Union, Local 1587; *John Saunders , Julie Nanos, Helen Ferreira-Walker, Matt Holland, Mark Gallina, Steve Harvey, Paul Jachymek, Robert Power* appearing for Metrolinx.

DECISION OF THE BOARD: October 3, 2011

1. This is an application brought by Amalgamated Transit Union, Local 1587 ("ATU" or "the union") under Part IV of the *Crown Employees Collective Bargaining Act, 1993* ("*CECBA*" or "the *Act*"). The Responding Party is Metrolinx (or "the employer").

2. The matter came before me on September 29, 2011 in a consultation format as directed by Chair Fishbein in his decision dated September 22, 2011.

3. The parties are agreed that a decision should issue quickly. Accordingly, these reasons will be succinct. The oral submissions of counsel are presented in abbreviated form and have been paraphrased. The written material was comprehensive.

What this case is about

4. ATU and Metrolinx disagree as to whether or not they are parties to a valid "essential services agreement" ("ESA") within the meaning of section 30 of *CECBA*. The employer says that it is not.

5. The consequence of this disagreement is the following.

6. The union has requested that the Minister of Labour ("Minister") issue what is known as a 'no board report' ("no board"). A no board is a statutory pre-condition for the ATU to begin the countdown to a possible lawful strike.

7. The Minister has declined to issue a no board in circumstances where the parties themselves do not agree that a valid ESA is in place.

8. ATU seeks a Board order pursuant to sections 36 and 38 of the *Act* requiring that Metrolinx recognize the existence of a valid ESA. It does so in order that the union may seek to obtain a no board and place its members in a position to strike lawfully.

9. The issue of a no board does not mean that a strike or lockout will occur. Any decision by a party to actually strike or lockout is a downstream question often determined by events following the issuing of a no board. In the vast majority of situations in this province, collective agreements are reached following the issue of a no board without recourse to either strike or lockout. It is generally understood however that, if there is a proximate reasonable possibility of a strike or lockout, there is a significantly enhanced incentive for the parties to reach a voluntary resolution without further delay.

Agreed upon facts

10. Metrolinx is a Crown Agency pursuant to the *Crown Agency Act, 2006,* S.O 2006, c. 16, subsection 3 (2) which was created under the *Metrolinx Act, 2006,* S.O. 2006, c. 16. Metrolinx is responsible for, among other things, the planning and implementation of integrated passenger transit services in the Greater Toronto and Hamilton area, including the GO Transit passenger bus and rail services. GO Transit is a division of Metrolinx.

11. ATU represents a large bargaining unit of over 1500 persons in the employ of Metrolinx who provide public transit and ancillary services at Go Transit. This bargaining unit

provides transit services of importance to the public across a densely populated urban area. Some members of this bargaining unit are also involved with Metrolinx train services. The employer estimates that Metrolinx provides approximately 14 million individual bus rides per year and approximately 44 million train rides. Metrolinx employs approximately 600 full time bus drivers.

12. Metrolinx and the union are parties to a collective agreement which bears the term June 2, 2007 to June 1, 2011. The parties are currently engaged in collective bargaining for renewal of that agreement. The union has represented this bargaining unit since 1979.

13. On March 11, 2011, Metrolinx and the union signed the following letter ("March 11 letter"):

LETTER OF AGREEMENT

Between:

GO Transit/Metrolinx (The "Employer")

-and-

Amalgamated Transit Union Local 1587 (The "Union")

Re: Essential Services Agreement
(as required under the Crown Employees Collective Bargaining Act, 1993)

> The Parties hereby agree that under the current definition of "essential services" under the Crown Employees Collective Bargaining Act, 1993, there are currently no job classifications within the bargaining unit or former Collective Agreement between the parties, which would qualify as being deemed "essential services".
>
> Therefore, the parties will initiate and continue collective bargaining with the understanding that all bargaining unit employees have the right to strike.
>
> Dated, signed and agreed to in Toronto, Ontario this 11 of March, 2011.

14. The March 11 letter was virtually identical to previous letters signed by the parties in 1996, 1999, 2002, 2003 and 2007. Those letters were all titled "Essential Services Agreement". None of these letters made any reference to emergency services.

15. Following execution of the 2007 ESA, a no board was issued by the Minister. The 2007 ESA was identical in form to the March 11 letter.

16. On August 30, 2011 the union requested that the Minister issue a no board.

17. On September 6, 2011 Ms. Ferreira-Walker, Director, Human Resources for the employer wrote to the union, raising concerns about the sufficiency of the March 11 letter.

18. On September 7, 2011 union counsel wrote to Metrolinx making various allegations and requiring withdrawal of the September 6, 2011 letter.

19. At no time prior to the filing of the Response to this Application did Metrolinx advise ATU as to why the March 11 letter was defective as an ESA. Nor did it provide proposed language to correct the alleged deficiencies.

20. On September 9, 2011 the Deputy Minister of Labour advised the union as follows:

> Given that the parties do not agree whether there is a valid ESA in place, I am not prepared at this time to make a decision about whether to establish a conciliation board or to issue a no board report in this case in the absence of assurances from the parties that they have made a valid ESA as required by *CECBA*.

21. On September 21, 2011 Metrolinx requested that the Ministry of Labour appoint a conciliation officer pursuant to subsection 35(1) of *CECBA* because, in the words of its Response:

> As of this date, the parties have not had the opportunity to specifically address these types of issues [Metrolinx suggestions for ESA inclusion] with regard to the essential services agreement…This will assist the parties in their negotiations and finalization of an essential services agreement which meets the legislated requires [sic] under *CECBA*"

22. On September 23, 2011, the Deputy Minister of Labour advised Metrolinx that:

> Given that the issue of whether a valid essential services agreement already exists (as required by CECBA) is currently before the Ontario Labour Relations Board, it would be inappropriate to make such an appointment at this time.

23. On the day before the hearing of this matter, September 28, 2011, Metrolinx provided the union and the Board, for the first time, with a draft agreement which in its opinion would constitute a valid ESA within the meaning of the *Act*. Metrolinx agrees that this draft would require further amendment after discussion with the union.

Facts not agreed

24. Metrolinx pleads that it signed the March 11 letter "with a valid, but mistaken belief that the letter met the requirements of section 31 of CECBA, and was a legal and valid 'essential services agreement' under that legislation".

25. ATU pleads that on June 22, 2011, during the course of bargaining, the union put to Metrolinx that there was a signed letter indicating that the union is not an essential service. The union states that in this exchange Metrolinx confirmed that there was an ESA in place.

26. Metrolinx pleads that: "in the course of contingency planning for a potential labour disruption, the Responding Party has evaluated the March 11, 2011 letter and has determined that it both fails to meet the legislative requirements of CECBA and fails to maintain the essential and emergency services provided by members of the bargaining unit".

27. Metrolinx pleads that on August 30, 2011 Ms. Ferreira-Walker, advised the union that she did not believe that the March 11 letter covered everything it needed to under the *Act*.

28. Metrolinx states that on August 31, 2011 Ms. Ferreira-Walker again raised the issue of the sufficiency of the March 11 letter at the bargaining table.

29. Metrolinx states that Mr. Kinnear, for the union, declined to discuss the sufficiency of the March 2011 letter at the August 31, 2011 bargaining session, stating something to the effect that dealing with the essential services agreement at that juncture would start a fire storm and blow [the negotiations] right up.

30. ATU states that, on August 31, 2011, Metrolinx raised an issue with respect to the fact that the ESA dated March 11, 2011 appeared on Local 1587 letterhead but did not indicate that the ESA was incomplete or invalid.

Process

31. At the hearing of this matter, the Board called first upon Metrolinx.

32. In my opinion, where it was undisputed that there was a signed document titled "Essential Services Agreement", the employer bore a burden to explain why the document should not be given its apparently intended effect. Mr. Saunders was pleased to proceed in this manner.

Position of the union

33. ATU submits that the parties reached a valid ESA in the March 11 letter and that this ESA reflected a consistent pattern which has been in place for multiple rounds of collective bargaining. The union relies upon the March 11 letter in support of its claim that the parties have agreed that no employees provide essential services and that all employees have an unfettered right to strike.

34. The union submits that the parties clearly intended that the term "essential services" in the March 11 letter cover both essential and emergency services.

35. ATU pleads that Metrolinx' "assertion that there is not a complete ESA, made at the eleventh hour, is a transparent attempt to deprive the members of the union of their right to strike because the Respondent and the Government of Ontario find the timing of the strike to be inconvenient or politically unpalatable".

36. Mr. Fellows reviewed the structure of *CECBA* and the relationship of the ESA negotiation process to the collective bargaining and dispute resolution processes in that statute. He emphasized that it was critically important to the scheme of the *Act* that parties know where they stand as stages of bargaining unfold. A last minute change in position concerning a previously agreed upon ESA is antithetical to the scheme of the statute. He observed that the parties were in the best position to determine what was required in an ESA and whether an ESA had been reached. Counsel noted that the *Act* does not provide a definition of "emergency services" deferring to parties to define and develop any requirement, if any, for same. He identified the sections of the *Act* which permitted parties to seek Board assistance with respect to alleged deficiencies in an ESA.

Position of the employer

37. Mr. Saunders presented his oral argument with admirable skill and focus. His core submission was that the March 11 letter fails to fulfill the essential services requirements of *CECBA* because it contains no reference whatsoever to the provision of emergency services. Mr. Saunders argued that an ESA could only be valid if it contained an express reference to an "emergency services part". This was a mandatory requirement established by Section 30 of the *Act* in his submission.

38. Section 30 reads as follows:

> **30.** In this Part,
>
> "essential services" means services that are necessary to enable the employer to prevent,
>
> (a) danger to life, health or safety,
>
> (b) the destruction or serious deterioration of machinery, equipment or premises,
>
> (c) serious environmental damage, or
>
> (d) disruption of the administration of the courts or of legislative drafting; ("services essentiels")
>
> "essential services agreement" means an agreement between the employer and trade union that applies during a strike or lock-out and that has,
>
> (a) an essential services part that provides for the use, during a strike or lock-out, of employees in the bargaining unit to provide essential services, and
>
> (b) an emergency services part that provides for the use, during a strike or lock-out, of employees in the bargaining unit, in addition to those referred to in clause (a), in emergencies. ("entente sur les services essentiels") 1993, c. 38, s. 30.

39. The argument had been framed more generally in the employer Response as follows:

> ...the exclusion of a service, either intentionally or through carelessness, inadvertence, or neglect, does not render that service 'unessential'. The Responding Party submits that the parties cannot contract out of the requirements of CECBA, and the failure to include existing essential services in a purported ESA renders that document invalid.

40. Counsel argues that it was simply not open to these parties to reach a valid ESA which lacked specific reference to an "emergency services part" and proposed several hypothetical scenarios to illustrate why this was and should be the case. For example, he recited examples such as: a serious nuclear problem at Pickering or Darlington, a 9/11 type of terrorist event, the Mississauga train derailment, the Superior propane explosion, the 2003 hydro black-out. He suggested that buses might be required for transport but also to be used for housing or medical

facilities in extreme circumstances. He mentioned certain bargaining unit classifications, Transit Safety Officers and IT functions, which would be required to support train services as well. Counsel did concede that these might be seen as 'one in a million' events but that disaster planning was required. He fairly acknowledged that union members would almost certainly respond voluntarily should something truly extraordinary of this kind actually occur.

41. Counsel also referred the Board to the requirement at subsection 8.1(1)(i) of the *Metrolinx Act, 2006* that the Corporation "develop an emergency and security plan for the regional transit system in co-ordination with the local transit systems in the regional transportation area".

42. To his credit, counsel acknowledged frankly that his client had only just provided the union with a detailed explanation of the specific deficiencies alleged in the March 11 letter and that the parties would necessarily be required to negotiate provisions concerning both essential and emergency services. He conceded that there was no doubt that properly authorized people had executed the March 11 letter on behalf of the employer but suggested that neither the union nor the employer had turned their minds to the section 30 requirement for an "emergency services part". He suggested that the parties had merely rolled over precedents from previous rounds of bargaining. He explained that it was simply not open to parties to contract out of what he submitted was a mandatory Section 30 requirement for an agreement to constitute an ESA.

Replies

43. Mr. Fellows submitted that the March 11 letter constituted a valid ESA on its face and that the statutory emergency services requirement was subsumed by the parties' recognition that no essential services were required of this bargaining unit. To put it another way, he suggested that provision for emergency services should be seen as supplementary to agreed upon essential services should an emergency situation occur. If the parties had agreed that no essential services were required, then they had agreed, *a fortiori,* that emergency services were not required either.

44. In response, Mr. Saunders suggested that his various hypothetical disaster scenarios could present illustrations of cases where classifications might not be required as essential in 'nomal' situations but where they may be if a disaster occurred. In reply to that suggestion, Mr. Fellows submitted that one could always conceive of improbable circumstances. He noted that the *Act* provided no definition of emergency services and that no-one could cover off every possible eventuality. The scheme of *CECBA* left it to the parties to work these things out and the parties had done so in this case. This case should not be decided on remote hypotheticals. The parties had not done so and neither should the Board.

Authorities

45. Counsel referred to the following cases: *Crown in Right of Ontario* [1995] OLRB Rep. June 735 (McCormack); *Crown in Right of Ontario* [2005] O.L.R.D. No 947 (Chauvin); *Crown in Right of Ontario* 2002 CanLII 38237 (ON LRB) (McKee); *Crown in Right of Ontario* 2002 CanLII 26132 (On LRB) (McKee); *Crown in Right of Ontario* [1996] OLRB Rep. March/April 284 (Trachuk).

Decision

46. I did not find it necessary to hear evidence to resolve the factual differences which were identified above. The case may be readily decided without such resolution. The consultation format was entirely adequate in my opinion to determine this Application.

47. The following relevant facts are undisputed:

- Metrolinx and the union have had a collective bargaining relationship for over 30 years.
- The parties have executed ESAs on several prior occasions.
- These ESAs have invariably declared that "there are no classifications currently contained within the Collective Agreement which would qualify as being 'essential services'".
- These ESAs have invariably declared that "the parties will initiate and continue collective bargaining with the understanding that all bargaining unit employees have the right to strike".
- The March 11 letter is titled in bold letters:

  Re: Essential Services Agreement
  (as required under the *Crown Employees Collective Bargaining Act, 1993)*
- Metrolinx has neither pleaded nor argued that it now employs persons in classifications which differ in any respect from the past.
- The March 11 letter is identical to the ESA executed by the parties in 2007.
- The Minister issued a no board without objection from Metrolinx in 2007.
- Metrolinx did not raise its concern about the adequacy of the March 11 letter as a valid ESA until August 30, 2011, [on the employer's best case, disputed by the union] the same day on which the union requested a no board.
- On September 6, 2011 Metrolinx advised the union in writing without elaboration that: "As we discussed during negotiations on August 31, 2011, I am writing to confirm our position that the parties do not have a complete essential services agreement which is in compliance with CECBA".
- Metrolinx did not identify any of its specific concerns about the March 11 letter until it filed its Response to the instant application on September 21, 2011.
- Metrolinx provided its draft proposal for what it saw as a valid ESA on September 28, 2011

48. Metrolinx is a major public sector employer in this province. It is a sophisticated employer with access to expert legal advice. Metrolinx admits that it intended to enter into a valid ESA when it signed the March 11 letter. The March 11 letter replicated several ESAs executed in previous rounds of collective bargaining. Metrolinx disavowed its agreement that the

March 11 letter constituted a valid ESA, at the earliest, on the same day that ATU applied for a no board. This repudiation occurred without warning and without contemporaneous justification.

49. Metrolinx submits that it signed the March 11 letter "with a valid, but mistaken belief" that it constituted a valid ESA within the meaning of the *Act*. In other words, this sophisticated employer now states that it was mistaken about the legal meaning of its written commitment. Metrolinx does so without any reasonable explanation as to why it came to this conclusion on the eve of a potential strike in 2011 -- as opposed to at any time since 1996.

50. On the agreed upon facts, the Board can only conclude that Metrolinx perceived some tactical, bargaining or other advantage in raising the essential services issue when it did at a critical collective bargaining juncture. The Board has no difficulty in appreciating why the union was outraged. The decision of Metrolinx to raise the ESA issue over five months after the March 11 letter was signed, on the very day that the union requested a no board, was utterly unacceptable absent cogent compelling explanation. This tactic, if it was a tactic, delayed the union's access to a possible strike for weeks. Whether or not the employer had a legitimate concern about the validity of the March 11 letter as an ESA, the union did nothing to deserve such action by Metrolinx. If the employer genuinely believed that it had a legal problem with the March 11 letter, it could have advised the union long before it did, which would have permitted Board resolution of the issue in a timely way.

51. Metrolinx asks the Board to rescue it from its alleged mistake. As suggested above, not only that, it asks the union to bear the bargaining consequences of its alleged error. If the Board is now to find that the March 11 letter constituted a valid ESA all along, there is no useful retroactive relief available to the union and its members in these circumstances given the passage of time.

52. It is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy

53. The Board itself routinely engages parties on any number of labour relations issues arising from its administration of the *Labour Relations Act, CECBA* and other labour statutes. Employers, trade unions, and individual employees sign agreements at the Board, literally on a daily basis, which are intended to bind them to what those agreements say.

54. The Board does not tolerate any party seeking to resile from such agreements once they are executed absent fraud or exceptional circumstances. See generally: *Midtown Meats Cold Storage Ltd.*, 2002 Can LII 31687 (ON LRB). Similarly, in the context of bargaining complaints, the Board has always subjected last minute changes of heart by either an employer or trade union to close scrutiny. The Board will typically look for a rational collective bargaining justification where a party introduces an issue at the last minute or repudiates an earlier understanding. See generally: *Municipal Property Assessment Corporation* 2010 Can LII 26713 (ON LRB) and the cases cited therein.

55. In *Midtown Meats, supra.*, it was said at paragraph 22:

> The Board is not prepared to permit the union to resile from its agreement that there were no further issues in the application for certification, and that

> it could be dismissed. The union has not provided reasons which are sufficiently compelling for the Board to depart from its consistent practice of not permitting parties to resile from their settlements...The Board is regularly faced with parties arguing that they did not appreciate the full ramifications of their actions. We often hear that employers did not understand the implications of signing a collective agreement, or the labour relations consequences of buying a unionized business. With respect, the circumstances of this case are no different. The Board's response has consistently been that parties are presumed to know the labour relations repercussions of the decisions they make, and in particular, of the agreements they reach. To permit a party to resile from an agreement in these circumstances is to create uncertainty around settlements and undermine the significant labour relations value of encouraging parties to enter into agreements, in the almost certain knowledge that they will be enforced by the Board.

56. The Board is no more prepared to accept this employer conduct than it would should a sophisticated trade union repudiate a signed ESA. Consider the equivalent hypothetical. An employer and a union agree that certain positions constitute essential services in a signed ESA. The employer subsequently determines to exercise its right to lockout five months later. On the same day the employer applies for the requisite no board preliminary to its right to lockout, the union rejects its prior agreement to provide essential services. The union claims, for the first time, that it earlier held a "mistaken belief" that the services were essential. It takes no imagination to conceive of that employer's reasonable reaction should the Minister decline to issue a no board simply because the union unilaterally decided five months later that the ESA, somehow, did not comply with section 30 of the *Act* without bothering to say why.

57. To be fair, Mr. Saunders would take no objection to these general statements of normal Board practice. Metrolinx simply submits that, whatever happened here and when, the March 11 letter is simply not compliant as a valid ESA within the meaning of section 30 of *CECBA*. If this be the case, in his submission, it does not matter when the issue is raised. Again, he emphasizes that parties cannot contract out of the *Act*.

58. The Board has concluded otherwise. In my opinion, the parties did in fact reach a valid ESA, as they admittedly intended to do, when they executed the March 11 letter.

59. It is useful to consider the general framework contained in the Part IV Essential Services section of *CECBA*. There is no doubt that the *Act* requires that the workplace parties will make the essential services determinations. See generally: Hadwen, Strang, Marvy, Eady *Ontario Public Service Employment Labour Law,* Irwin Law, 2005, at p. 451. The *Act* expressly provides for a good faith ESA bargaining obligation and for the provision of conciliation services during those negotiations. The *Act* plainly contemplates ESA bargaining by workplace parties on a timetable preliminary to substantive collective bargaining. Such collective bargaining may lead to timely dispute resolution mechanisms including the right to strike or lockout.

60. The *Act* very definitely does not contemplate initial determinations concerning ESAs by the Board nor does it contemplate last minute changes of position by one of the parties. The *Act* does provide for Board access where a party wishes to amend an existing ESA.

61. In *OPSEU v. The Crown in Right of Ontario* [1995] OLRB Rep. June 735 the Board said the following at paragraphs 16-17:

> ...If we are to be candid about adjudication in this area, at least at this point, we must admit that our decisions will be approximate in a forum in which we would prefer prescience.
>
> For this and other reasons, the emphasis in the legislation on the parties reaching agreement in this area is extremely important. As employers and employees in the various institutions and functions involved, they are in a much better position [than the Board] to make these kinds of assessments and to create sounder and flexible solutions.

62. In the same case the Board said at paragraph 57:

> Although we are not prepared to make orders which suggest that the parties are contracting out of the Act, it does seem to us that the question of when an essential service agreement exists is a factual matter within the realm of the parties' agreement. Moreover, it is apparent that problems may arise at any time, including during a strike or lockout without having the effect of implying that an essential services agreement has not been completed. Indeed, section 41 refers to emergencies *during* a strike or lockout and the parties have agreed upon a definition of emergency services which includes "any other unforeseen circumstances which call for immediate action that falls within the definition of section 30". Section 38 also provides that a party may apply to amend an agreement. (emphasis added)

63. Given the scope for good faith disagreement as to what might constitute or continue to constitute a legitimate essential or emergency service, the submission by Metrolinx in its Response -- that exclusion of an essential service from an ESA renders the entire document invalid -- must be rejected. The *Act* itself makes express provision for an application to the Board to amend an ESA should a party believe it to be inadequate within the meaning of subsection 38(2). It does not contemplate the ability of either party to unilaterally declare that an executed ESA is entirely invalid if it should change its mind.

64. In this case Metrolinx and ATU reached their own ESA in 2011 in the March 11 letter. The March 11 letter is an agreement expressed in terms which could not be less unambiguous. It is an agreement which replicated ESAs reached on several occasions in the past. There has never been any previous suggestion, nor until the Response to this Application was filed was there a suggestion in 2011, that the ESAs were somehow deficient because there was no express recognition in the ESAs of an emergency services part.

65. Given the language of the agreed upon 2011 ESA, which provided expressly that "all bargaining unit employees have the right to strike", the Board finds that the 2011 ESA implicitly covered both essential and emergency services and constituted a valid ESA within the meaning of the *Act*.

66. I have considered the submission by Metrolinx that it is conceivable that there might be a requirement for particular services in emergency situations which might not be deemed "essential" in other than emergency situations. I agree however with the union's response on this

point. One is always able to conjure up hypotheticals. However, these parties intended to reach an ESA in 1996 and they have done so on a number of occasions over the last fifteen years.

67. Metrolinx is prepared to concede that the March 11 letter is not rendered invalid because it fails to identify essential services which the employer now says are required. Metrolinx advises that, unless it secures some agreement from the union, that it will seek an amendment to the March 11 letter by means of an application pursuant to subsection 38(2). The union takes no issue with the employer's right to do so. As set out above however, Metrolinx submits that the failure to identify an emergency services part, one way or the other, renders the March 11 letter invalid as a Section 30 ESA.

68. The Board is not prepared to accept such a literal interpretation of the statute. If this argument is successful, any purported ESA which fails to record that emergency services are *not* required would nevertheless be invalid even in circumstances where it was agreed that emergency services were not required as a matter of fact.

69. The Board is not prepared to prefer form over substance, all the more so where the timing of this late blooming employer objection is so inherently suspect. If indeed it is true, and it may be, that 'emergency services' may normally but not always constitute a sub-set of 'essential services', then this is something for the parties to initially determine. Counsel and the Board in a hearing discourse may play with various disaster scenarios all too readily. However, it is for the ATU and Metrolinx to make initial assessments about their applicability to this employer. For the last fifteen years it has not occurred to this employer, let alone the union, that any member of this bargaining unit performs an essential or emergency service within the meaning of *CECBA*.

70. The Board is fortified in its conclusion when section 38 of the *Act* is examined. Section 38 reads as follows:

> **38.** (1) A party to an essential services agreement may apply to the Board to enforce it. 1995, c. 1, s. 42.
>
> Amendment of agreement
>
> (2) A party to an agreement may apply to the Board to amend it,
>
> (a) if the agreement does not provide for services that are essential services;
>
> (b) if it provides for levels of service that are greater or less than required to provide the essential services; or
>
> (c) if it provides for too many or too few employees in the bargaining unit to provide the essential services. 1995, c. 1, s.42.
>
> (3) On an application under this section, the Board may enforce the agreement or amend it and may make such other orders as it considers appropriate in the circumstances. 1995, c. 1, s. 42.

(4) Subsection 32(2) applies with necessary modifications when the Board is deciding an application under subsection (2). 1995, c. 1, s. 42.

71. If the Board were to construe subsection 38 (2) literally without reference to its plainly intended purpose (accepting the Metrolinx argument that the phrase "essential services" may not incorporate "emergency services") then one could reach the conclusion that *CECBA* makes no provision for parties to seek an ESA amendment with respect to emergency services. I do not see such an interpretation as making any sense at all. Surely there can be no doubt that parties may seek ESA amendments which have application to emergency services.

72. The Board concludes that, if the phrase "essential services" is sufficient to include "emergency services" for purposes of Section 38, then the phrase was equally capable of subsuming "emergency services" when Metrolinx and ATU executed the March 11 letter. The parties intended to reach a comprehensive valid ESA on March 11, 2011 and they accomplished their objective.

73. For the foregoing reasons the Board, pursuant to subsections 36(1)(d) and 38(3) of *CECBA,* declares that Metrolinx and Amalgamated Transit Union, Local 1587 are bound to a valid ESA dated March 11, 2011.

2922-09-U United Brotherhood of Carpenters and Joiners of America, Local Union 1256, Applicant v. **United Brotherhood of Carpenters and Joiners of America,** Responding Party

Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Reconsideration – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

BEFORE: *Bernard Fishbein*, Chair.

DECISION OF THE BOARD: October 26, 2011

1. This is an application pursuant to section 114 of the *Labour Relations Act, 1995,* S.O. 1995, c.1 as amended ("the Act") that the Board reconsider its decisions dated August 29 and September 19, 2011.

2. The request is based on three grounds:

(a) the bias and perceived bias of the Vice-Chair;

(b) the use of a consultation to hear this application as opposed to a *viva voce* hearing which the applicant wished; and

(c) the merits of the decision which the applicant says fails to fairly and properly apply the statutory language.

3. The request is a lengthy and detailed submission of approximately 23 pages and some 66 paragraphs.

4. In addition, this request was not only filed with the Registrar of the Board but also with the Chair of the Board. In the applicant's submission this application is of such significance that the Board ought not to follow its longstanding and usual method of dealing with reconsideration requests but rather refer this request for a hearing before a panel of three different construction Vice-Chairs (not to include the Vice-Chair who rendered the original decision) and stay the original decision pending such a hearing.

5. This decision deals only with that latter request. The Board declines that request for the reasons outlined in this decision. The reconsideration request will be referred to the Vice-Chair who originally heard and determined the application in accordance with the Board's longstanding policy and practice for the following reasons.

6. The Board's reconsideration power is rarely successfully invoked. This is not due to any self-serving characterization that the Board's initial decisions are rarely incorrect (or that most reconsideration requests are frivolous) but because the hurdle to overcome before the Board will reconsider its decision is necessarily high. That is because there is a need in any litigation for finality to the decision-making process. This is particularly true in labour relations where, notwithstanding the increasing length of proceedings before the Board, heed is still attempted to be paid to the notion that labour relations delayed is labour relations denied. This policy is not recent or novel. It traces its origin over fifty years and was expressed early in *Detroit River Construction Ltd.*, 63 CLLC ¶16,260 (and has been frequently quoted or rephrased in subsequent cases):

> While depending upon the circumstances of the case and the applicable principles of natural justice, the Board ought not to be as strict or as technical as a Court, it must nevertheless, in our view, recognize the necessity for and apply some principle of finality to its decision. It stands to reason that when a party has gone through the ordeal, expense and inconvenience of a hearing and obtained a decision in his favour, that he should not be deprived of the benefit of that decision except for good cause. The Board ought not to encourage a practice whereby one party can remain silent throughout a hearing, and after he has discovered the weak points in his adversary's armour be permitted to exploit them by calling evidence at another and later hearing which he could and should have presented at the original hearing. If it were otherwise, the door would be open in any given case to ceaseless and never-ending hearings each serving as a prelude to the

> next *ad infinitum* and no one could ever safely rely on any decision as finally settling the rights of the parties.

The Board has frequently said that its reconsideration power is neither a tool for a party to repair the deficiency of its case initially nor an opportunity to reargue it. Moreover, the Board will generally not reconsider its decisions unless the requesting party has new evidence that would not only be practically conclusive of the case but also which could not have reasonably been obtained earlier.

7. Because of this significant concern that old arguments, unsuccessful initially, will simply be recast or reargued, evidence that was or could have been reasonably available earlier will not be sought to be adduced, on reconsideration the Board's practice for almost 60 years has been to remit a request for reconsideration to the original panel that originally heard it.

8. For example, in *Knight Security Guards Limited*, [1970] OLRB Rep. June 377, judicial reviews of the earlier Board decision had been unsuccessful but both the Divisional Court and the Court of Appeal expressed serious reservations about the correctness of the Board's interpretation and indicated they would have found otherwise. This prompted a reconsideration request not dissimilar to the Applicant's:

> 5. In its latest request for reconsideration, the applicant requests "that this matter be heard by a panel of the Board which was not hitherto involved in these cases. We also respectfully suggest that a five member Board presided over by the Chairman or alternate Chairman be appointed to entertain our request for reconsideration."
>
> 6. In support of its request concerning the manner in which the Board should be constituted to review its decision in this matter, the applicant submits that "in the interests of the Board, the parties and the general public and to insure that justice appears to be done, we have recommended that the same panel of the Board should not be called upon to decide on the propriety of its own decision. This, in our view, is consistent with the principles of natural justice."
>
> 7. The applicant further submits that "... In view of the opinion expressed by the four Judges, there is certainly reason to gravely doubt the correctness of the Board's decision and in particular its interpretation of section 9. In our respectful submission, the Board is clearly in error. When an administrative tribunal such as the Board is given exclusive jurisdiction to determine all questions of fact or law that may arise in any matter before it and also is given the protection of a wide privative clause, it ought not refuse to reconsider its decision in circumstances such as these, especially when doubt has been cast upon it by a superior Court. There are, of course, no facts in dispute. The main issue is one of the proper legal interpretation to be given to section 9. A refusal by the Board to deal with the matter at this stage would, in our respectful submission, be tantamount to ignoring the considered opinion of the Courts on this matter, as well as ignoring any assistance or argument questioning its decision..."
>
> ...

> 9. The decision dated September 17th, 1968 is not merely the decision of a division of the Board which heard the case but is, in fact, the decision of the Board. **It is trite to say that the jurisdiction conferred by section 79(1) [now 114] of the Act, whereunder the Board may reconsider any decision, must be exercised by the division which is seized of the matter. The very act of reconsideration contemplates that the matter will be considered again by the division which considered the matter the first time. If section 79(1) contemplated that a decision of the division could be reviewed by another division of the Board, the Act would have provided for review rather than reconsideration.**
>
> 10. **The Board has never adopted the practice of having one division of the Board to sit in appeal on decisions of another division. In our view, the Act is not broad enough to permit the Board to set up an appellate division in the manner suggested by the applicant in this case.**
>
> (emphasis added)

Or put another way, more recently in *SNC-Lavalin Inc.*, 2010 CanL11 66545 at para. 5:

> The Board's normal approach when dealing with a reconsideration request is to have the same panel of the Board that issued the decision determine the request for reconsideration of that decision unless there are exceptional circumstances that warrant a different panel of the Board undertaking a review of that initial decision. **Simply put, one panel of the Board does not conduct an appellate review of another panel's decision.** See *Metropolitan Plumbing & Heating Contractors Association*, [1986] OLRB Rep. Sept. 1252. For these reasons, this panel of the Board is determining the merits of the applicant's reconsideration request.
>
> (emphasis added)

Although there may not be "any absolute legal requirement that the power of reconsideration can only be exercised by the panel making the original decision," see *EKT Industries Inc.*, [1987] OLRB Rep. May 696 at para. 13:

> ... No doubt it is convenient and prudent to have the original panel reconsider its decision because that panel will be in the best position to know the evidence and argument that was before it and to decide whether its decision should be varied. Indeed, if the request for reconsideration involves a challenge to the Board's factual findings or reference to the evidence before the Board, the case may have to go back before the original panel because, in the absence of a transcript, there is no way that anyone else would be in a position to address those issues. If another panel tried to deal with the matter it might be drawn into what is, effectively, a trial *de novo*, which would seriously undermine the finality of the decision which section 106 itself contemplates. ...

This request is almost a textbook justification for such policy. Almost all of it relates to arguments allegedly misapplied or misconstrued apparently made at the initial hearing or evidence (or inferences from evidence) allegedly improperly drawn or not before the original panel. Who better to determine whether this is evidence (or inference from evidence) or

arguments that were originally made or could have been made at the hearing than the original hearing Vice-Chair? Another Vice-Chair of the Board (or three as the applicant requests here) would be in no real position to determine to what extent these are arguments already made and adjudicated upon. Granting the applicant's request to place this application before another panel in essence amounts to granting the applicant, in the guise of reconsideration, a hearing *de novo*. In my view, that defeats the Board's jurisprudence about reconsideration only being rarely invoked and does serious harm to the notion of finality of decision-making in labour relations. Like any unsuccessful party before the Board (whether they are as passionate in their views of the case as may be the situation here or not), this is an invitation to a second level of decision-making before the Board. That is neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in this province.

9. Why then should we depart from this general jurisprudence policy in the circumstances of this case? Because the applicant alleges bias against the original Vice-Chair once again? The fact is this allegation of bias was already raised by the Applicant and was exhaustively dealt with by the Vice-Chair in a decision dated October 1, 2010, prior to the ones that the Applicant now seeks reconsideration (and not even adverted to in the reconsideration request). Not only was this decision over a year ago, and the hearing then proceeded on the merits, but that decision has never been challenged by the applicant heretofore.

10. Moreover, the bias allegation is, in my view, completely without merit. The facts here are relatively straightforward. This is an application brought pursuant to the provisions of section 96 of the Act alleging that the United Brotherhood of Carpenters and Joiners of America ("the International Union") has violated sections 147 and 149 of the Act in requiring the applicant, the United Brotherhood of Carpenters and Joiners of America, Local 1256 ("the Local") to become part of the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America ("the CDC").

11. As there exists for all of the other trades in the industrial, commercial and instructional sector ("ICI") of the construction industry, there exists a Provincial Collective Agreement for Carpenters. The International and the CDC are the designated employee bargaining agency pursuant to the provincial legislation. However, over the years the Provincial Collective Agreement has been executed only between the CDC (albeit on behalf of all of the other locals in Ontario and the International) and the Employer Bargaining Agency ("EBA'). In the most recent negotiations for the renewal of the Carpenters' Provincial Collective Agreement, the CDC and the EBA (and not the International) entered into an agreement providing for a mediation/arbitration process as the dispute impasse resolution mechanism. In other words, if the collective agreement was not successfully negotiated, rather than strike, the outstanding provisions of the aspect would be settled by mediation/arbitration. It may be that the Local may not have been in favour of that process and preferred to maintain the right to strike, as it alleged in the reconsideration request. In any event, its view within the CDC did not prevail and is unconnected to its subsequent dispute with the International.

12. The arbitrator selected and named in that mediation/arbitration agreement between the CDC the International was the Vice-Chair (and alternatively another arbitrator) who ultimately heard this application. In any event, not surprisingly, as customarily would be the case, the selection of the Vice-Chair as the arbitrator was without the consent of the Vice-Chair (or even his knowledge). Only when the Provincial Collective Agreement negotiations between the CDC and the EBA were proving to be unsuccessful was a mediation arbitration arranged. Before the

scheduled mediation arbitration, the Vice-Chair was advised there were many issues still on the table. However, on Monday March 15, 2010 the Vice-Chair was advised that all non-monetary issues had been settled and only a potential wage increase was outstanding. At the time the actual mediation arbitration commenced, all of the outstanding wage disputes among the Locals (including the Applicant) had been resolved without any input, adjudication or involvement of the initial Vice-Chair, with the exception of two other Locals. The Vice-Chair then rendered a decision with respect to those two other Locals (and not the Applicant Local). That mediation arbitration was then concluded. The final award was issued at least a month before the initial Vice-Chair had any contact or connection with this application.

13. In its reconsideration, the Applicant asserts:

> The applicant has no objection to Vice-Chairs taking private appointments. But as this case illustrates, the perception of lack of partiality will arise if the Vice-Chair acts for a parent and then subsequently determines that section 147 and 149 dispute between the parent and the Local Union.

14. That assertion is simply incorrect. Leaving aside that the Vice-Chair quoted "acted" for no one but was the mediator or the adjudicator, the Vice-Chair was not retained by the parent union. In any event, if any of that were true (and it is not) that dispute was ended prior to the Vice-Chair being involved in this application. There was no continuing involvement of the Vice-Chair (even acting as a mediator). Moreover, it was never a dispute involving the International Union at all – rather, the Vice-Chair settled the wage schedule for two other locals other than the Applicant.

15. To put it simply, the position of the applicant is, having conceded that it does not have "any objection to Vice-Chairs taking private appointments", if a Vice-Chair had taken a private appointment involving any party which concluded prior to any particular Board file subsequently involving that party, then that Vice-Chair would be perceived to be biased.

16. The Board takes allegations of bias seriously. The Board regards a reasonable apprehension of bias to be a very serious matter. However, the test for the standard for reasonable apprehension is relatively well settled and has been established by the Supreme Court of Canada and was noted in the Vice-Chair's decision: see *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369; 1976 CanLII 2 (S.C.C.) at p. 394:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

Taking into account the Applicant has conceded that there is nothing at all improper about Vice-Chairs accepting private appointments, I do not think a reasonable and right-minded person in the words of the Court, "having obtained the required information" about the world of labour law and private arbitration in Ontario and having "viewed the matter realistically and practically and having thought the matter through" would think there is any possibility of bias in these set of circumstances.

17. As noted before, the applicant was already given a full opportunity to make these submissions earlier and the Vice-Chair rendered a lengthy decision. I concur completely with that decision. Moreover, nothing has changed since that decision other than the applicant is now dissatisfied with the results the Vice-Chair has rendered on the decision on the merits, which the Applicant chose to proceed with.

18. In my view, none of that warrants departing from the Board's traditional practice for reconsideration, and accordingly, this matter will be referred for reconsideration to that Vice-Chair.

0929-11-M Workers United Canada Council, Applicant v. **Workers United** and Canadian Office & Professional Employees Union, Local 343, Responding Parties

Employer – Reference – The Minister referred two questions to the Board: (1) does the Minister need to know the correct name of the employer to appoint an arbitrator under section 49 of the Act when the union seeking to have the Minister appoint an arbitrator named an employer who objected to the appointment on the grounds it was not the employer party to the collective agreement under which the grievance was filed? And (2) if so, did the union in this case name the employer who was the party to the collective agreement? The Board determined the Minister needed to know the identity of the employer party to the collective agreement under which the grievance was filed – On the facts of this case, the Board held that the union had not named the right employer in its request to the Minister – The Board explicitly rejected the argument that the employer's identity is an issue of arbitrability that ought to be dealt with by the arbitrator

BEFORE: *Harry Freedman*, Vice-Chair.

APPEARANCES: *Andrea Bowker* for Workers United Canada Council; *Glenn Wheeler, Mary Stalteri, Barry Fowlie* and *Iqbal Sumbal* for Canadian Office & Professional Employees Union, Local 343; *Ira Jay Katz* for Workers United.

DECISION OF THE BOARD: September 21, 2011

1. The Minister referred two questions to the Board pursuant to section 115(1) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 as am. (the "Act") in respect of the exercise of his power under section 49(4) of the Act to appoint a single arbitrator. Section 115(1) provides:

> The Minister may refer to the Board any question which in his or her opinion relates to the exercise of his or her powers under this Act and the Board shall report its decision on the question.

2. The Canadian Office & Professional Employees Union, Local 343 ("COPE") requested the Minister appoint an arbitrator under section 49 of the Act in respect of a grievance dated February 22, 2011 over the lay off of Iqbal Sumbal. COPE named the Workers United Ontario Council (the "Ontario Council") as the employer party to the arbitration proceeding. The

Ontario Council objected to the Minister making the appointment on the grounds it was not the employer that was a party to the collective agreement under which the grievance was filed.

3. At the commencement of the hearing of this matter the Board was advised that the Ontario Council had changed its name to Workers United Canada Council (the "Council"). The Council at the hearing of this matter filed the Board's decision in *Sleep Country Canada LP*, unreported, Board File No. 0679-11-R, decision dated June 13, 2011 in which the Board held the Council is the same entity formerly known as the Ontario Council. Therefore, the Board amended the title of this proceeding to reflect the correct name of the party objecting to the Minister appointing an arbitrator under section 49 of the Act.

4. The two questions in respect of which the Minister asked the Board to provide its decision are:

> i) Does the Minister need to know the identity of the employer bound by the collective agreement applicable to the grievance that is the subject matter of COPE's request for the appointment of an arbitrator in order have the authority to make that appointment?
>
> ii) If the answer to question i) is yes, did COPE in its request for the appointment of a single arbitrator name the employer that is bound by the collective agreement applicable to the grievance that is the subject of its request?

The Board by decision dated September 9, 2011 dismissed COPE's request to have the Board deal with the two questions posed by the Minister separately. That decision also dealt with the request by the Council to have the Board determine its preliminary motion for an order advising the Minister that COPE's request for the appointment of an arbitrator was an abuse of process. The Council relied on the underlying grievance having already been determined by an arbitrator duly constituted under the collective agreement applicable to the grievance as the basis for having the Board deal with its motion before even determining the first question the Minister referred to the Board.

5. Those two questions were referred to the Board after the Ministry of Labour advised the parties there were concerns about the Minister's authority to appoint an arbitrator. COPE in its request to the Minister asserted the Ontario Council was the employer of Mr. Sumbal and that it and the Ontario Council were bound by the June 10, 2006 collective agreement between UNITE HERE and the Federation of Union Representatives ("FOUR").

6. The Council objected to the Minister appointing an arbitrator under section 49 of the Act to deal with Mr. Sumbal's lay off grievance. The Council asserted it was not Mr. Sumbal's employer and that it was not a party to the collective agreement relied on by COPE and under which Mr. Sumbal's grievance was filed. The Council asserted Workers United was Mr. Sumbal's employer at all material times and that Workers United was the employer bound by the June 10, 2006 collective agreement relied on by COPE.

7. Workers United in its submissions to the Minister asserted it was the employer of Mr. Sumbal. It also conceded it was the successor employer to UNITE HERE for purposes of the Act and was therefore bound by the June 10, 2006 collective agreement. There is no dispute that COPE was the successor union to FOUR.

8. At the hearing of this matter the Board reviewed with the parties the material facts that did not appear to be in dispute based on the materials filed by the Minister and the parties. COPE had indicated in its material that it believed the identity of Mr. Sumbal's employer was a complex legal and factual matter that required the Board to receive testimony because it anticipated both the Council and Workers United would dispute those facts. Nevertheless, it appeared to me the first question the Minister asked was a legal issue and the facts relevant to the determination of that issue were not in dispute.

9. The Board advised the parties it would deal with the first question the Minister referred to the Board and then, depending on the determination of that issue, would receive the parties' submissions with respect to the Minister's second question and the Council's preliminary motion.

10. The Board invited COPE to state all the facts relevant to the determination of the second question it intended to prove through evidence. After COPE did so, although the Council made clear it disputed some of those facts, it nevertheless suggested that even if the Board accepted all the facts COPE intended to prove as being established, there was still no basis for the Board to conclude the Council was the employer party to the collective agreement under which Mr. Sumbal's grievance was filed. The Council reiterated its position that Workers United and its predecessor, UNITE HERE, was Mr. Sumbal's employer and was content to argue that position as if this was a *prima facie* motion for the relief COPE requested. That is, for purposes of this proceeding, the Council, while denying many of the assertions made by COPE, was prepared to accept them in order for the Board to determine whether on those facts, COPE can demonstrate the Council was the employer of Mr. Sumbal and a party to the June 10, 2006 collective agreement between UNITE HERE and FOUR (the "FOUR Collective Agreement").

THE RELEVANT CONTEXT

11. Workers United is an international union based in New York City. The Council is an affiliate of Workers United based in Ontario. As an affiliate of Workers United, the Council is a distinct entity that employs staff to carry out its functions. Workers United employed organizers who were covered by the FOUR Collective Agreement. COPE is the successor union to FOUR and Workers United is the successor employer to UNITE HERE. Both COPE and Workers United are bound by the FOUR Collective Agreement.

12. The FOUR Collective Agreement contains two groups of Canadian job classifications, Field and Professional. The job classification of organizer is in the Field group.

13. COPE was a party to a collective agreement with UNITE HERE Ontario Council that was negotiated and ratified in September 2006. The Ontario Council and now the Council are bound by the collective agreement between COPE and UNITE HERE Ontario Council by virtue of section 69 of the Act as at least a part of the "business" of UNITE HERE Ontario Council was acquired by the Ontario Council (and now the Council). The parties characterized the Ontario Council and now the Council as the successor to UNITE HERE Ontario Council for purposes of

section 69 of the Act.[1] The bargaining unit in that collective agreement is all employees of UNITE HERE Ontario Council save and except the Ontario Council Director, Legal Counsel, Assistant to the Director and persons above the rank of Assistant to the Director. The job classifications in that collective agreement refer to clerical and regional representative positions. That collective agreement between UNITE HERE Ontario Council and COPE was renewed effective October 1, 2008 and expired October 1, 2010. The Council, as the ultimate successor employer to UNITE HERE Ontario Council remains bound by that COPE collective agreement with UNITE HERE Ontario Council.

14. The organizers working in Ontario on the UNITE HERE payroll who came within the scope of the FOUR Collective Agreement joined COPE in 2008 and COPE applied for certification to represent those individuals. Those organizers (and others) who had been working under and paid by UNITE HERE pursuant to the FOUR collective agreement worked in the offices of UNITE HERE Ontario Council. COPE was successful in its certification application. As a result the Board, by decision and certificate issued on October 28, 2008 (Board File No. 1911-08-R) certified COPE as the exclusive bargaining agent for the following bargaining unit described at paragraph 2 of the Board's October 28th decision:

> All employees employed by UNITE HERE in the Province of Ontario on the International Payroll, save and except the Canadian Director, Assistant to the Canadian Director, Organizing Supervisor/Coordinator and persons above the rank of Organizing Supervisor/Coordinator.

It is clear from that decision that COPE asserted UNITE HERE was the employer of the organizers (and others) who came within the bargaining unit.

15. Mr. Sumbal was employed as an organizer and was on the Workers United payroll, and was previously on the UNITE HERE payroll. Mr. Sumbal was an employee in the bargaining unit for which COPE was certified by the Board's decision dated October 28, 2008.

16. COPE by letter dated November 10, 2008 gave notice to bargain to Alex Dagg. That letter was addressed to "Ms. Dagg, Regional Director, UNITE HERE".

17. Ms. Dagg was both the regional director of UNITE HERE in Ontario and the director of UNITE HERE Ontario Council. Ms. Dagg continues to be the Canadian director of Workers United and the director of the Council. I understood from the agreed facts Ms. Dagg is the senior person responsible for the Council and is also the Workers United senior person in Canada. In other words, Ms. Dagg is an official of both the Council and Workers United.

18. COPE acknowledged it had not entered into a collective agreement with UNITE HERE Ontario Council or with the Council which specifically refers to the bargaining unit for which it was certified.

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[1] The Board in *Tiercon Corp.*, [2010] OLRB Rep. Nov./Dec. 871 held the Ontario Council was not the successor *union* to UNITE HERE Ontario Council for purposes of section 68 of the Act. In this proceeding, the parties agreed that for purposes of section 69 of the Act the Ontario Council was the successor *employer* to UNITE HERE Ontario Council and was bound by the COPE collective agreement with UNITE HERE Ontario Council.

19. COPE and UNITE HERE Ontario Council engaged in collective bargaining through 2008 and 2009 and reached a renewal of their collective agreement applicable to the clerical and regional representative staff employed by UNITE HERE Ontario Council.

20. According to the submissions filed by COPE, the Ontario Council in bargaining for the renewal of the COPE collective agreement agreed to use that collective agreement "as the template for a collective agreement between COPE 343 and WUOC [Workers United Ontario Council] covering organizers." That is, the Ontario Council gave COPE a commitment to use the COPE collective agreement covering business representatives and clerical staff as the template for a collective agreement covering organizers. Paragraph 5 of the addendum to the COPE and UNITE HERE Ontario Council memorandum of agreement provided:

> Commitment to use the Workers United Ontario Council Collective Agreement to bargain the International Organizers Collective Agreement.

21. COPE made repeated attempts to get the Ontario Council to the bargaining table to negotiate a collective agreement for organizers but has not been successful. COPE accepts it had not entered into a collective agreement with the Ontario Council applicable to organizers as of February 2011 when Mr. Sumbal was given notice of lay off by Workers United and COPE filed the grievance that gives rise to this proceeding.

22. Mr. Sumbal was not the only organizer on the Workers United payroll working in Ontario. When Mr. Sumbal was laid off and was no longer on the Workers United payroll, another organizer on the Workers United payroll with less seniority remained employed. That more junior organizer had also been removed from the Workers United payroll and was subsequently engaged on the Ontario Council payroll.

23. As a result of that lay off, COPE filed a grievance against Workers United. That is, COPE in its grievance named Workers United as Mr. Sumbal's employer and relied on the seniority provisions of the FOUR Collective Agreement. COPE's grievance on behalf of Mr. Sumbal was ultimately referred to arbitration under Article 25 of the FOUR Collective Agreement which establishes a roster of three permanent arbitrators who appear to be based in the Unites States.

24. Arbitrator Robert Herzog issued a notice of hearing on June 2, 2011 advising COPE and Workers United that the hearing of Mr. Sumbal's grievance would take place on June 15, 2011 in New York City. COPE immediately objected to Mr. Herzog's jurisdiction to deal with the matter. COPE contended Mr. Sumbal's lay off grievance should be dealt with by an Ontario arbitrator under the Act. COPE referred to another grievance involving Mr. Sumbal dealing with sick benefits that is scheduled to be heard before an Ontario arbitrator.

25. On June 7, 2011 COPE filed its request under section 49 of the Act seeking to have the Minister appoint an arbitrator to deal with Mr. Sumbal's lay off grievance. In that request COPE asserts the Ontario Council is the employer. COPE filed the FOUR Collective Agreement with its request under section 49 of the Act as the collective agreement applicable to Mr. Sumbal's layoff grievance.

26. At some point prior to his lay off, Mr. Sumbal had filed a grievance relating to sick benefits under the FOUR Collective Agreement. COPE contends that grievance is proceeding

before Arbitrator Russell Goodfellow without objection from the Council. COPE points out the Council has never taken the position in the sick benefits grievance proceeding that it was not Mr. Sumbal's employer or that it was not bound by the FOUR Collective Agreement. COPE asserts Mr. Goodfellow was selected to deal with Mr. Sumbal's sick benefits grievance pursuant to section 48 of the Act.

27. According to COPE the Council held itself out as the employer in connection with Mr. Sumbal's sick benefits grievance. It points out the same people and the same legal counsel who are dealing with that grievance are also dealing with grievances under the Council collective agreement with COPE.

28. Mr. Herzog proceeded to deal with Mr. Sumbal's grievance on June 15, 2011. COPE did not attend the hearing. Workers United did attend and presented evidence that established Mr. Sumbal was laid off from his employment with Workers United.

29. Mr. Herzog, in dismissing the grievance, determined Mr. Sumbal was not an employee of any of the Workers United affiliate councils but was an employee of Workers United. The arbitration award issued in July, 2011 by Mr. Herzog held that Mr. Sumbal and the other organizers in Canada were placed on lay off status and were not recalled. Mr. Herzog concluded the Ontario Council employed two of the organizers after their layoff by Workers United. The arbitrator dismissed Mr. Sumbal's grievance because his employer, Workers United, had not maintained the employment of any organizers. Rather it had laid them off and a different employer, the Council, hired them.

QUESTION 1 SUBMISSIONS

30. COPE submits in connection with the first question that it is not necessary for the Minister to know the name of the employer before he can appoint an arbitrator under section 49 of the Act. It contends as long as the grievance relates to parties to a collective agreement then it is not necessary for the Minister to determine which particular employer is the party to the collective agreement. It submits the identity of the correct employer is a matter for the arbitrator, in the same way any other issue relating to the arbitrability of a grievance is a matter for the arbitrator.

31. COPE argues that the Minister will and should appoint an arbitrator if the parties disagree about whether there is a collective agreement in force and that the identity of the employer is the same kind of an issue. COPE relies on the decision of the Board in *Columbia Forest Products*, [2003] OLRB Rep. May/June 401 in which the Board determined that whether there was a collective agreement in place at the time the grievance arose was an arbitrability issue and therefore could be properly determined by the arbitrator. The existence of that issue did not preclude the Minister from making the section 49 appointment.

32. COPE also submitted there were good policy reasons for having the matter of the employer's identity determined by an arbitrator. According to COPE, doing so facilitates the parties meeting to face to deal with not just that issue but the overriding labour relations issues between the parties.

33. The Board also heard brief submissions from the Council in which it addressed the submissions made by COPE. Workers United adopted the Council's submissions.

ANSWER TO QUESTION 1

34. After hearing the parties' submissions the Board advised the parties at the hearing with brief oral reasons that is was necessary for the Minister to know the identity of the employer before exercising the power conferred by section 49 of the Act.

35. The Minister's authority to appoint an arbitrator flows from section 49(4) of the Act. Section 49(4) provides:

> Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him or her, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

Section 49(4) of the Act requires the Minister to appoint an arbitrator when he or she receives a request under section 49(1). In this case, it seems to me the issue is whether COPE's request was a request under section 49(1). Section 49(1) provides:

> ... a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

The request for the appointment of an arbitrator under section 49(1) can only be made by a party to the collective agreement who seeks an arbitrator to deal with "any difference between the parties to the collective agreement". In my view, that requires, when an objection is made to the Minister making an appointment, a determination as to whether the difference that the party seeking the appointment wants the arbitrator to resolve is a "difference between the parties to the collective agreement". That is, if the dispute giving rise to the request is not with the other party to the collective agreement then the request cannot be a request under section 49(1) of the Act. In that circumstance, the Minister does not have the authority to appoint an arbitrator pursuant to section 49(4) because the request the Minister received was not a request under section 49(1).

36. If the party requesting the appointment of an arbitrator under section 49 of the Act identifies an entity as the party to the collective agreement under which the dispute arose and that entity contends it is not a party to that collective agreement, then it seems to me that objection should not simply be ignored by the Minister. That issue is, in my opinion, properly referred to the Board for determination before the Minister exercises his or her power under section 49(4).

37. In *Columbia Forest Products* the Board wrote at page 406:

> 25. ... The Act contemplates that there may be situations where an arbitrator is appointed even though a matter is not arbitrable. Since the jurisdiction to determine whether a matter is arbitrable is specifically given to the arbitrator appointed by the Minister it makes no sense for the Minister

> to engage in a process of determining whether a matter is properly brought as a grievance. That is a matter left to the arbitrator who has the specific power to determine that question.
>
> 26. In this case there is no dispute that there was a collective agreement and that the two parties before the Board in this case were parties to that collective agreement. The issue between the parties is whether there was a violation of that collective agreement. ...

It is significant, in my opinion, that the Board in *Columbia Forest Products* pointed out that the arbitrability of a grievance was not an issue that would preclude the Minister from making the appointment yet specifically noted in that case there was no dispute there was a collective agreement and "that the two parties before the Board in this case were parties to that collective agreement."

38. It seems to me that section 115(2) of the Act reinforces the view that the identity of the parties to a collective bargaining relationship and collective agreement is material to the Minister's authority to make an appointment under section 49. Section 115(2) provides:

> If the Minister refers to the Board a question involving the applicability of section 68 (declaration of successor union) or 69 (sale of a business), the Board has the powers it would have if an interested party had applied to the Board for such a determination and may give such directions as to the conduct of its proceedings as it considers advisable.

Section 115(2) contemplates the Board undertaking an enquiry under section 68 or 69 of the Act in the context of a Ministerial referral as "if an interested party had applied to the Board for such a determination". The specific reference to the Minister referring a question "involving the applicability of section 68... or 69" suggests to me the Minister must be satisfied about the identity of the union and the employer when he or she is asked to exercise his or her power to make an appointment in respect of their relationship, including appointing an arbitrator.

39. In this case, the party named by COPE as the employer in its request under section 49 of the Act claims it is not the party to the collective agreement that gave rise to the grievance. That objection needs to be resolved before the Minister has the authority to appoint an arbitrator under section 49 of the Act.

40. Therefore, the answer to the first question is yes.

QUESTION 2 AND PRELIMINARY MOTION SUBMISSIONS

41. After the Board advised the parties of its answer to this first question, the Board proceeded to hear the parties' submissions as to whether the Council was an employer party to the FOUR Collective Agreement. On agreement of the parties, the Council and Workers United proceeded first to argue there was nothing on the facts presented by COPE that could possibly result in the Board finding that the Council was the employer bound by the FOUR Collective Agreement. They also at the same time made submissions with respect to the Council's preliminary motion. COPE then made detailed submissions in response with the Council providing a brief argument in reply.

42. COPE acknowledges it has not entered into a collective agreement with the Council in respect of organizers. It accepts that the FOUR Collective Agreement is binding on Workers United as the successor employer to UNITE HERE. It maintains however that the Ontario Council was the employer of Mr. Sumbal when he was laid off and therefore when it retained another organizer with less seniority, it violated the collective agreement applicable to organizers, that is, the FOUR Collective Agreement.

43. COPE argues that the Ontario Council, by making a commitment to negotiate a collective agreement applicable to organizers in bargaining and by applying the terms and conditions of the FOUR Collective Agreement in respect of the organizers who worked in its offices accepted it was the employer of the organizers and thereby became bound by that collective agreement.

44. COPE submits that even though it has not yet entered into a collective agreement with the Council applicable to organizers, the Council has throughout the relevant period applied the terms and conditions of the FOUR Collective Agreement and therefore has acted as if it is bound by that collective agreement and is a party to it.

45. COPE was certified as the bargaining agent for the employees of what is now Workers United who were on the international union's payroll in October 2008. COPE asserted at that time that what is now Workers United was the employer of the organizers working in Ontario. It did not contend at that time or at any time prior to the lay off of Mr. Sumbal that the Council or its predecessors was his employer.

46. COPE asserts Ms. Dagg, who is responsible for the Council, had overall day to day authority over the organizers and gave them direction. Therefore, according to COPE, the Council must be viewed as their direct employer despite how they were paid. COPE also contends that the same people it deals with in respect of its grievances under its collective agreement with the Council have been responsible for the Sumbal sick benefits grievance under the FOUR Collective Agreement and therefore have not only assumed the responsibility for complying with that collective agreement but have effectively become bound by it. COPE argues that the Council by its conduct had attorned to the jurisdiction of Ontario arbitrators to deal with disputes under the FOUR Collective Agreement.

47. The Council and Workers United point out that Ms. Dagg has responsibility for both the Council and Workers United in Ontario. They suggest COPE is ignoring the fact that although Workers United employees and Council employees have worked in the same office for years and may get direction from Ms. Dagg they have always worked under two distinct collective agreements for two distinct employers. That is confirmed by the correspondence from COPE to Ms. Dagg dated March 13, 2009 that was filed by COPE in which COPE writes to Ms. Dagg as Director UNITE HERE and points out that having learned that the UNITE HERE Ontario Council is about to disaffiliate from UNITE HERE International, COPE "as the representative of the UNITE HERE staff, we will continue to represent these workers under this new entity."

48. The Council accepts it has not said it was not the employer in relation to the Sumbal sick benefits grievance. It has not done so because, the Council argues, that issue never arose in that matter. That is, the Council never understood COPE was asserting the Council, not Workers

United was Mr. Sumbal's employer. The Council points out that according to COPE, Mr. Goodfellow was appointed pursuant to section 48 of the Act which permits the Minister to appoint an arbitrator if the parties under a collective agreement fail to do so. As far as the Council is concerned, the parties to the FOUR Collective Agreement, that is Workers United or its predecessor and COPE had an arbitrator appointed under section 48 of the Act. The Council contends there was no document filed by COPE and no specific representation made by the Council referred to by COPE which suggested it rather than Workers United was Mr. Sumbal's employer.

49. The Council also argues the fact that it and Workers United use the same legal counsel in connection with certain matters and that Ms. Dagg took responsibility in relation to Mr. Sumbal's sick benefits grievance does not advance COPE's position since Ms. Dagg has responsibilities for both Workers United and the Council. The Council says nothing turns on two different employers using the same counsel to represent each of them in different proceedings.

ANSWER TO QUESTION 2

50. The thrust of COPE's argument is that the Council has applied the terms and conditions of the FOUR Collective Agreement in relation to the organizers and in particular Mr. Sumbal, specifically in connection with the sick benefits grievance. I accept COPE's assertion that the Council applied the FOUR Collective Agreement provisions in dealing with the organizers and in particular in dealing with Mr. Sumbal and his sick benefits grievance. Doing so does not, in my view, provide even an arguable basis for finding that the Council is an employer bound by that collective agreement.

51. It is well established that an employer may apply the terms and conditions of a collective agreement without becoming bound by or a party to that collective agreement. See *Ecodyne Limited,* [1979] OLRB Rep. July 629; *Comstock Canada Ltd.*, [2006] OLRB Rep. July/August 501.

52. I also accept the Council was prepared to negotiate a collective agreement with COPE applicable to organizers. But as COPE acknowledges, it had never reached a collective agreement with the Council applicable to organizers.

53. COPE has not alleged any fact that would establish the Council agreed it was an employer bound by the FOUR Collective Agreement. To the contrary, from the moment COPE was certified up to and after the lay off of Mr. Sumbal, COPE has consistently addressed UNITE HERE and subsequently Workers United as the employer of the organizers, including Mr. Sumbal. The representation made by the Council in collective bargaining did not change that. COPE does not assert as a fact the Council had advised COPE at any time that it was the employer of the organizers on the UNITE HERE now Workers United payroll. The representation made by the Council in bargaining was that it was prepared to enter into a separate collective agreement covering organizers that was modelled on the COPE collective agreement with the Council. That fact does not lead to the conclusion that the Council was at that time the employer of the organizers. More importantly, that representation in bargaining and the fact that no such collective agreement was ever concluded cannot, it seems to me, be a basis for finding the Council had agreed it was bound by and applied the FOUR Collective Agreement to deal with the organizers until a new collective agreement with COPE applicable to organizers was reached.

54. There were no organizers on the Council's payroll until the Council engaged two of the organizers who had been laid off by Workers United.

55. The FOUR Collective Agreement was the collective agreement under which COPE filed the Sumbal lay off grievance. It was the collective agreement COPE claimed was applicable in its section 49 request.

56. There is no doubt that the successors to the parties to the FOUR Collective Agreement were COPE as the successor trade union and Workers United as the successor employer. COPE and Workers United were the parties to the collective agreement giving rise to the "difference" in respect of which the Minister was asked to appoint an arbitrator. The Council was not.

57. Therefore, the answer to the second question is no.

58. In view of my conclusions there is no need for me to comment on the preliminary motion made by the Council.

REPORT TO THE MINISTER

59. The Board pursuant to section 115(1) of the Act hereby reports its decision to the Minister in answer to the two questions referred to the Board:

i) Does the Minister need to know the identity of the employer bound by the collective agreement applicable to the grievance that is the subject matter of COPE 's request for the appointment of an arbitrator in order have the authority to make that appointment?

ANSWER: Yes

ii) If the answer to question i) is yes, did COPE in its request for the appointment of a single arbitrator name the employer that is bound by the collective agreement applicable to the grievance that is the subject of its request?

ANSWER: No

COURT PROCEEDINGS

3122-04-G (Court File No. 462/10) Greater Essex County District School Board - and- United Association of Jouneymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 and OLRB

Construction Industry Grievance – Judicial Review – Timeliness – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a

referral to arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5 months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the grievance to arbitration – The Board found that although the grievance was clearly untimely in terms of the collective agreement, the matter was arbitrable because the arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

Superior Court of Justice (Divisional Court), J. Wilson, R. Smith and Hoy JJ., October 7, 2011

J. WILSON J.

REASONS FOR JUDGMENT

Overview

[1] This application is for judicial review of two decisions of Vice-chair David McKee of the Ontario Labour Relations Board (the "Vice-chair"), dated January 5, 2009 (the "Jurisdiction Decision") and May 14, 2010 (the "Arbitration Decision").

[2] The Greater Essex County District School Board (the "School Board") requests a declaration that the grievance in question was not arbitrable and hence that the Jurisdiction Decision should be quashed. Alternatively, if the grievance was arbitrable, the School Board relies upon the doctrine of promissory estoppel and requests that the Arbitration Decision be quashed.

[3] The Ontario Labour Relations Board (the "OLRB") has jurisdiction to hear arbitration matters only in the construction industry as time is so often of the essence in deciding these matters promptly before the pressing questions in issue become moot.

[4] The timelines in this case are extraordinary in their length, and place in focus the applicant's challenge as to why the decisions of the Vice-chair are unreasonable.

[5] The grievance was filed by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (the "Union") on July 27, 2004. The grievance was not referred to arbitration until December 9, 2004, exceeding by four months the 14-day time limit for referral of a matter to arbitration outlined in the governing collective agreement.

[6] The Vice-chair then adjourned *sine die* the request for referral to arbitration pending a determination of whether the School Board was a related employer as a result of the 1998 merger of two former school boards. The grievance concerned work conducted by the School Board in 2004. The grievance was later amended to include further work that took place in 2005. Intervening decisions affecting the parties were pronounced in 2006 and following, declaring the School Board to be a related employer.

[7] On January 5, 2009, in the Jurisdiction Decision, five years after the grievance was filed, the Vice-chair concluded that the grievance was arbitrable and accepted the referral of the grievance to arbitration pursuant to sections 133(5) and (6) of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c.1, Sched. A (the "OLRA").

[8] On May 14, 2010 in the Arbitration Decision, six plus years after the grievance was filed, the OLRB rejected the School Board's argument that promissory estoppel applied and determined that the School Board had breached the governing collective agreement. The School Board was ordered to pay damages to the Union, the quantum of which was to be assessed.

[9] For reasons to be fully outlined below, we conclude that the grievance was not arbitrable in light of the terms of the parties' collective agreement and the principles outlined in *Service Employees International Union, Local 204 v. Leisureworld Nursing Homes Ltd.* (1997), 99 O.A.C. 196 (Div. Ct.) ("*Leisureworld*"). Further, we conclude that the alternate interpretation articulated by the Vice-chair that section 48(16) of the OLRA may be employed to extend the

time for referring the grievance at issue to arbitration was unreasonable. Finally, we conclude for a variety of reasons that the interpretation proposed that section 133 of the OLRA would also provide the OLRB with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement is unreasonable.

[10] As we conclude that the Vice-chair was without jurisdiction to proceed with the arbitration, both the Jurisdiction Decision and the Arbitration Decision shall be quashed.

Standard of Review

[11] The School Board submits that the standard of review with respect to the Jurisdiction Decision is correctness, whereas the Union and the OLRB argue that the appropriate standard of review is reasonableness.

[12] We are of the view that the applicable standard of review of the Jurisdiction Decision is reasonableness.

[13] We adopt the reasoning of Swinton, J. in *Communications, Energy and Paperworkers Union of Canada, Local 27 v. Bell Canada*, 2011 ONSC 2517 (Div. Ct.). She confirmed that the determination of arbitrability engages the standard of review of reasonableness:

> 19 ... The interpretation by a labour arbitrator of a collective agreement, including what is arbitrable under that collective agreement, lies at the core of the arbitrator's expertise. Therefore, this decision is reviewable on a standard of reasonableness with respect to the issue of arbitrability (*Parry Sound District School Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII), [2003] 2 S.C.R. 157 at para. 16; *Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology* 2006 CanLII 14236 (ON CA), (2006), 80 O.R. (3d) 1 (C.A.) at paras. 47-48).

[14] Although the Divisional Court concluded in *Leisureworld* that decisions as to arbitrability, made by interpreting the terms of the Collective Agreement as well as the statutory provisions of s. 48(16) of the OLRA, engaged the standard of correctness, we note that this decision was pre-*Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190. The more recent trend in administrative law decisions is that the standard of review for expert tribunals interpreting their home statute will be reasonableness.

[15] The Supreme Court of Canada stated in *Dunsmuir* at paras. 51 and 53, that "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness". Further, deference is appropriate "where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have a particular familiarity... [or] where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context": see *Dunsmuir* at paras. 54-55.

[16] We conclude that a standard of reasonableness applies as the OLRB is recognized for its expertise, the governing legislation affords the decision-maker a strong privative clause, and as the matters for determination fits within the nature and purpose of the statutory regime. (See:

Ontario Sheet Metal Workers' & Roofers' Conference v. Ellis-Don Limited, 2010 ONSC 3783 (CanLII), 2010 ONSC 3783 at paras. 5-9).

[17] All parties agree that the standard of review of the Arbitration Decision is reasonableness.

Background Facts

Merger of the two school boards

[18] The School Board is comprised of the former Essex County Board of Education and the former Board of Education for the City of Windsor. It was created as one School Board effective January 1, 1998, as part of a broader government initiative to merge hospitals and school boards to promote public efficiency.

[19] Prior to the 1998 merger, the geographic jurisdiction of the Windsor Board was the City of Windsor. The geographic jurisdiction of the Essex Board was the County of Essex, except the City of Windsor and the Township of Pelee.

[20] The former Windsor Board was bound by Provincial Collective Agreements with the Union and other unions. Therefore, all construction work for the Windsor Board had to be performed by unionized workers bound by the Provincial Collective Agreements.

[21] The Essex Board was not bound by the Provincial Collective Agreements and could tender contracts for construction work to both union and non-union workers.

[22] The Union is a construction-industry trade union consisting of members who are plumbers and pipefitters and are party to the governing Provincial Collective Agreements. Prior to 1998, the Union had bargaining rights with the Windsor Board for both maintenance and construction work pursuant to the governing Provincial Collective Agreements. Prior to 1998, the Union held no bargaining rights with the Essex Board.

The transition provisions in the* Public Sector Labour Relations Transition Act, 1997, *S.O. 1997, c. 21, Schedule B

[23] When the School Board was created as a result of the merger in 1998, the Ontario government passed the *Public Sector Labour Relations Transition Act, 1997*, S.O. 1997, c. 21, Schedule B (the "*PSLRTA*"), and Regulations thereunder to recognize different labour practices and obligations such as in the predecessor school boards.

[24] Regulation 457/97 (the "Regulation") provided that bargaining rights held by unions in the construction industry were preserved, but only in the geographic areas of the predecessor school boards. The Regulation specifically addresses situations, where, as here, one of merged school boards was not party to the collective agreement.The Regulation provides:

> 1.(1) If a predecessor employer was a municipality or a school board and a construction union had bargaining rights with respect to a bargaining unit of that employer that contained or would have contained employees who performed construction work, the following apply:

> 1. The description of the bargaining unit of the successor employer referred to in subsection 14(1) of the Act shall not include, or be changed under section 22 of the Act to include, employees who perform construction work outside the geographic jurisdiction of the predecessor employer unless the successor employer agrees.
>
> 2. Despite Sections 15 and 24 of the Act, a collective agreement that bound the predecessor employer immediately before the changeover date does not bind the successor employer with respect to construction work performed outside the geographic jurisdiction of the predecessor employer unless the successor employer agrees. [Emphasis added.]

Events post-merger to 2004

[25] After 1998, the School Board relied upon the Regulation to continue its past practice to tender construction contracts to both union and non-union workers for work performed in the geographic region of the former Essex Board. In the geographic region of the former Windsor Board, the School Board continued its past practice to tender construction contracts only to unionized workers subject to the Provincial Collective Agreements.

[26] The tender documents issued by the School Board after 1998 reflected their understanding of their different obligations pursuant to the Regulation.

[27] The relationship between the Union and the School Board for maintenance work, as distinct from construction work, performed for the former Windsor School Board was governed by a different provincial collective agreement than that which governed construction work. The former Essex School Board was not subject to either agreement.

[28] After the creation of the merged School Board, during the labour negotiations in 2002 and 2004, the Union made efforts to extend bargaining rights for maintenance work (as distinct from construction work) to include the geographic area of Essex. The School Board resisted these requests and no extension was granted in the governing collective agreements in 2002 and 2004 to the Union for maintenance work in the geographic area covered by the former Essex School Board.

[29] By way of contrast, no active steps were taken by the Union with respect to extending the bargaining rights of the Union for construction work until a letter was written by the Union's counsel on June 14, 2004. Counsel alleged in that letter that the School Board was bound by the Provincial Collective Agreement for Essex as well as Windsor for all construction work performed. This letter is important in assessing the estoppel argument advanced by the School Board in the Arbitration Decision.

The Union files a grievance concerning construction work

[30] On July 27, 2004, the Union filed the grievance that is the subject matter of this proceeding with the School Board for breach of the Provincial Collective Agreement as construction work was being done in the former Essex School Board at two schools by non-unionized workers.

[31] The terms of the Provincial Collective Agreement state in Article 17.2 that "the difference may proceed directly to arbitration under the provisions set out in Article 18, within fourteen (14) regular working days from the date the grievance arose, but not later. Any time limits stipulated in this Article may be extended by mutual agreement of the parties in writing." [Emphasis added.]

[32] On December 9, 2004, four and a half months after the grievance was filed, the Union referred the grievance to arbitration before the Board. The School Board objected to the referral as being out of time.

[33] There is no explanation for the delay of four and a half months.

[34] It is this late filing of the grievance to arbitration that founds the School Board's assertion that the referral to arbitration exceeds the mandatory time limits stipulated in the governing collective agreement and that the grievance is therefore not arbitrable.

The Related Employer Application

[35] On December 9, 2004, concurrent with the referral of the grievance to arbitration, the Union brought an application to have the School Board declared to be one employer, or to have the School Board declared a related employer pursuant to sections 69 or 1(4) of the OLRA. In this application, the Union sought to acquire bargaining rights for construction work performed by the School Board beyond the geographic jurisdiction of the Windsor Board to include construction work performed in the jurisdiction of the former Essex Board (the "Related Employer Application").

[36] The history of the Related Employer Application beginning in December 2004 to date provides the backdrop for, and intertwines with, this application for judicial review.

[37] The School Board disputed the Union's application pursuant to sections 1(4) and 69 of the OLRA. It was the position of the School Board that the geographic region of Essex was not subject to the Provincial Collective Agreement for construction work either historically or by the clear, unequivocal transition provisions in the Regulation.

[38] On his own initiative on December 9, 2004, the Vice-chair adjourned *sine die* the Union's referral of the July 27, 2004, grievance to arbitration. The School Board did not object to the adjournment, subject to preserving all of its rights with respect to issues of jurisdiction.

[39] Pending the determination of the Union's Related Employer Application, the School Board continued to rely on the terms of the Regulation and tendered construction work in the area of the former Essex Board to both unionized and non-unionized workers.

[40] In 2005, three contracts in the area of the former Essex Board were tendered to contractors employing non-unionized workers. On August 19, 2005, the Union amended the July 27, 2004, grievance to include work performed in Essex by non-unionized workers on these three other projects. The School Board did not object to this amendment, subject to preserving all of its rights.

[41] On January 4, 2006, Vice-chair McKee granted the Union's application pursuant to section 1(4) of the OLRA and declared the School Board to be a related employer retroactive to the date of merger in 1998. He dismissed the Union's section 69 OLRA application (the "2006 Related Employer Decision").

[42] The School Board sought judicial review of the 2006 Related Employer Decision. Sachs J., writing for the majority of the Divisional Court, 2007 CanLII 741 (ON SCDC), (2007) 83 O.R. (3d) 601, dismissed the application for judicial review. Carnwath, J. in dissent, concluded that the School Board was entitled to rely on the Regulation and opined that the 2006 Related Employer Decision was patently unreasonable. Leave to appeal to the Ontario Court of Appeal and to the Supreme Court of Canada was denied: 2007 CarswellOnt 9371 (C.A.); [2007] S.C.C.A. No. 384.

[43] On June 9, 2006, the Union sought to have the grievance filed December 9, 2004, relisted for arbitration.

The Jurisdiction Decision

[44] After conclusion of the legal proceedings concerning the Related Employer Decision, the referral to arbitration of the December 9, 2004 grievance came back before the Vice-chair. On January 5, 2009, the Vice-chair concluded for a variety of reasons in the Jurisdiction Decision that although the grievance was clearly untimely in terms of the collective agreement, the timelines could be extended and the matter was arbitrable.

[45] The Vice-chair concluded at paras. 46-54 of his reasons that the terms of the governing Provincial Collective Agreement respecting the referral of a grievance to arbitration were separate and distinct from the terms of the grievance procedure. Therefore, applying *Leisureworld*, he found that s. 48(16) was not available as a means by which to extend the time for referral to arbitration. However, the Vice-chair also found that, unlike in *Leisureworld*, the mandatory provisions found in the governing agreement related only to steps taken in the grievance procedure. In his view, the provisions respecting referral to arbitration were directive only. Hence, he concluded that he had discretion under the terms of the collective agreement itself to extend the directory timelines, and he exercised that discretion to extend the time to refer the matter to arbitration.

[46] In the alternative, the Vice-chair concluded that arbitration process and the grievance process were inextricably linked in the collective agreement, so the decision in *James Bay General Hospital v. Public Service Alliance of Canada* (2004), 238 D.L.R. (4th) 730 (Ont. S.C. (Div. Ct.)) ("*James Bay*") applied and he had jurisdiction to extend the time limits pursuant to section 48(16) of the OLRA.

[47] In the final alternative, the Vice-Chair concluded that the OLRB had the authority to extend the time for referral to arbitration by the terms of section 133 of the OLRA, which in his view grants the Board "unfettered discretion" (para. 62).

[48] In the result, on January 5, 2009, almost five years after the grievance was filed, the Vice-Chair determined that it was "appropriate to accept the referral of the grievance to arbitration under subsections 133(5) and (6), despite the fact that the grievance was referred after the time limits set out in the Collective Agreement" (para. 74).

The Arbitration Decision

[49] The May 14, 2010, Arbitration Decision applied the 2006 Related Employer Decision of the Vice-chair to this grievance.

[50] As the Related Employer Decision was retroactive to the date of merger in 1998, the only defence available to the School Board in the circumstances was estoppel. In the Arbitration Decision, the Vice-chair rejected the School Board's position that the Union was estopped by its conduct from relying upon the terms of the Collective Agreement. He declared that the School Board had breached the terms of the governing Provincial Collective Agreement and the matter was set for a hearing to assess the damages arising from the breach.

[51] The parties settled the quantum of damages payable by the School Board to the Union in the amount of $400,000.00. This settlement was without prejudice to the School Board's right to raise issues concerning the Jurisdiction Decision and the Arbitration Decision. Notwithstanding the settlement as to quantum, it is the position of the School Board that the requirement to pay damages to the Union in the facts of this case results in an unjust enrichment to the Union and is inequitable.

Analysis of the Terms of the Governing Collective Agreement

Plain meaning of the terms of the collective agreement

[52] A fundamental principle of both contract and labour law is that the terms of the governing collective agreement must be interpreted in accordance with the plain meaning of its words, and that the intention of the parties reflected in the words of the collective agreement is to be respected. If an arbitrator disregards the plain meaning of the collective bargaining agreement to, in effect, write something into the agreement and give the agreement a meaning that it otherwise could not reasonably bear, the arbitrator will have exceeded his jurisdiction and the award cannot stand: see, e.g. *Canadian Westinghouse Co. Ltd. and Local 164 Draftsmen's Association of Ontario*, [1962] O.R. 17 (C.A.) at para. 4.

[53] The analysis therefore begins with a review of Articles 17 and 18 of the Provincial Collective Agreement, which govern construction work with the Union.

[54] Articles 17 and 18 provide as follows:

> ARTICLE 17 -- GRIEVANCE PROCEDURE
>
> ...
>
> 17.2 Any difference arising directly between the Zone Association or Contractor and the Union, or between the Zone Association and the Contractor, as to interpretation, application, administration or alleged violation of this Agreement, that cannot be resolved by a meeting or conference between the parties involved, shall be submitted by registered mail in writing by either of such parties to the Board within four (4) regular working days of such difference. The written submissions shall state the nature of the grievance, any pertinent provisions of this Agreement, and remedy sought.

On receipt of such grievance, the Board shall be convened, within four (4) regular working days, to discuss the grievance as submitted in writing, and attempt to reach a settlement between the parties. In the event a settlement cannot be reached within four (4) regular working days from the date upon which the Board convened, either party may request that the matter be referred to arbitration. Where there is no Board, the difference may proceed directly to arbitration under the provisions set out in Article 18, within fourteen (14) regular working days from the date the grievance arose, but not later. Any time limits stipulated in this Article may be extended by mutual agreement of the parties in writing.

17.3 Any grievance submitted by the employee, the Union, the Zone Association or the Contractor, that has not been carried through Article 17 -- Grievance Procedure Clauses and in accordance with the time limits specified, or mutually agreed to, will be deemed to have been settled satisfactorily by the parties of the grievance.

ARTICLE 18 -- ARBITRATION

18.1 In the event that any difference arising between any Contractor and any of the employees, or any direct difference between the Zone Association, or any Contractor and the Union or between the Zone Association and a Contractor, as to the interpretation, application, administration or alleged violation of this Agreement, including any question as to whether a matter is arbitrable, shall not have been satisfactorily settled by the Board under the provisions of Article 17 -- Grievance Procedure -- hereof, the matter may be referred by the Zone Association, any Contractor or Union to arbitration for the final binding settlement as hereinafter provided, by notice in writing given to the other party within fourteen (14) regular working days from the submission of the matter in writing to the Board.

18.2 When either party requests that a dispute be submitted to arbitration as herein before provided, it shall notify the other party in writing, and at the same time, nominate an arbitrator. Within (5) regular working days thereafter, the other party shall nominate an arbitrator.

18.3 The two arbitrators so nominated shall attempt to select by agreement, a Chairman of the Arbitration Board. If they are unable to agree upon a Chairman within a period of five (5) regular working days following the date of their appointment, they shall then request the Minister of Labour for the Province of Ontario to appoint a Chairman.

18.4 No person may be appointed as an arbitrator who has been involved in an attempt to negotiate or settle the grievance.

18.5 No matter may be submitted to arbitration which has not been properly carried through the proper steps of the Grievance Procedure.

18.6 The Arbitration Board shall not be authorized to make any decision inconsistent with the provisions of this Agreement, nor to alter, modify nor amend any part of this Agreement.

> 18.7 The proceedings of the Arbitration Board shall be expedited by the parties hereto, and the decision of a majority of such Board shall be final and binding upon the parties hereto and the employee or employees concerned. If there is no majority decision, then the decision of the Chairman shall govern.
>
> 18.8 Each of the parties hereto shall bear the cost of the arbitrator appointed by it, and the parties shall share equally the costs of the Chairman of the Arbitration Board.
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> 18.9 For the purpose of applying the provisions of this Article, Saturdays, Sundays and Holidays are excluded.
>
> [Emphasis added.]

[55] The School Board is the "Contractor". The "Board" referred to in these articles is the local board. It is not disputed that as there was no local board. Therefore, the governing clause for referral to arbitration is contained in Article 17.2: "the difference may proceed directly to arbitration under the provisions set out in Article 18, within fourteen (14) regular working days from the date the grievance arose, but not later. Any time limits stipulated in this Article may be extended by mutual agreement of the parties in writing." [Emphasis added.]

[56] We conclude that on their plain meaning the words of Article 17.2 provide a timeline for referral of a grievance to arbitration at the Board that is mandatory. Specifically, we are persuaded by the inclusion of the words "but not later" and the reference to "extension by mutual written agreement of the parties", which indicate that the parties contemplated the issue of the extension, and agreed that timelines could not be extended without written agreement.

The referral to arbitration is mandatory not directive

[57] The Vice-chair concludes at para. 53 of his reasons that, even if the timeline for referral to arbitration within 14 days appears mandatory on its face, the words will be interpreted as directory if no consequence is provided for a failure to refer the matter to arbitration within the stated time. The Vice-chair suggests at para. 55 that if "the time limits are directory only, an arbitrator may exercise his or her discretion to permit the referral of the grievance to arbitration if it is appropriate to do so."

[58] At para. 53, the Vice-chair outlines his reasoning:

> For many years, there has been a consensus among the vast majority of arbitrators that the provisions in a collective agreement regarding the steps in a grievance procedure and the referral of a grievance to arbitration are mandatory only if there are specific consequences that flow from the failure to take the required step, e.g. the grievance is deemed withdrawn or deemed to be settled on the basis of the employer's position or another provision that indicates a finality to the process (see Brown and Beatty, *Canadian Labour Arbitration* (4th edition) Canada Law Book, 2008) at pages 2-93 to 2-94).

[59] We disagree with the Vice-chair's conclusion that the timelines for referral to arbitration under the Collective Agreement are directory for two reasons.

- First, there are clear consequences specified in the collective agreement if the timelines are not met. When the grievance timelines expired, there was nothing to refer to arbitration, and the OLRB had no jurisdiction to proceed.

- Second, we are of the view that the Vice-chair has overstated the principle of when mandatory language may become directive. We disagree with his categorical statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive.

There are clear consequences if the matter is not referred to arbitration within 14 days

[60] Article 17.3 stipulates that "any grievance … that has not been carried through Article 17 – Grievance Procedure Clauses and in accordance with the time limits specified, or mutually agreed to, will be deemed to have been settled satisfactorily by the parties to the grievance." [Emphasis added.]

[61] Article 18.5 confirms that "No matter may be submitted to arbitration which has not been properly carried through the proper steps of the Grievance Procedure."

[62] The consequences outlined in Article 17.3 for failure to abide by the mandatory or agreed timelines can only be read as having application to both the initial grievance and settlement efforts, and referral to arbitration, both of which are outlined in Article 17.2, as confirmed in Article 18.5.

[63] Article 17.3, if engaged, brings the grievance and the referral to arbitration to an end through a deemed settlement. The jurisprudence of the OLRB holds that the effect of such a clause is that, once engaged, there is nothing left that could be referred to arbitration.

[64] This principle is outlined in *Centro Masonry Ltd.*, [1997] O.L.R.D. No. 2267, where the OLRB in its consideration of the scope of section 133 of the OLRA stated as follows:

> 33 In my view, the correct interpretation of section 133(2) is to permit the Board to accept a referral at any time while the matter constitutes a "grievance" as defined by the collective agreement. This is consistent with the language of section 133(1) which uses the category "grievance", to describe the thing which is referred under that section. While the matter is still considered "alive" for purposes of the collective agreement, it can be brought to the Board without exhausting the grievance procedure. This is why the process is considered to be an expedited one. Once the matter however is deemed to be abandoned, it no longer exists as a "grievance". At this point, according to the agreement there is nothing left to be referred "at any time". Without an extant "grievance", the Board has nothing with which to proceed. [Emphasis added.]

[65] *Centro Masonry* has been applied to dismiss late referrals to arbitration, such as in *Don Cordingley Gradall Rental Ltd.*, [2007] O.L.R.D. No. 4219, where the OLRB confirmed as follows:

> 22 ... Article 6.5 of the Provincial Agreement provides that where steps are not taken within the time specified in Article 6 and 7 (or as extended by the parties in writing) the grievance "shall be deemed to have been abandoned and may not be re-opened". The Board has previously determined that where the applicable collective agreement deems the grievance abandoned because it was not referred to arbitration within the timeframe prescribed in the collective agreement there is no "grievance" left that can be referred to the Board under section 133 of the Act. (See: *Centro Masonry Ltd., supra*). ...
>
> 25 ... [T]his is not an appropriate case for the Board to exercise its discretion to relieve against the application of the time limit in the Provincial Agreement for the union to refer this grievance to arbitration. More importantly, under the Provincial Agreement the grievance is deemed abandoned so there is no grievance that can be referred to the Board under section 133 of the Act.

[66] Similarly, see the analysis at paras. 10-11 of *Ontario Power Generation*, [2003] O.L.R.D. No. 1835 ("*Ontario Power* (2003)"), where the OLRB (chaired by the Vice-chair) confirmed that a provision providing that a grievance would be "deemed settled" in the absence of a response from the employer at a certain stage would, if engaged, mean that the grievance would become "ineligible for arbitration. That is, it does not progress further in the grievance procedure, but dies at that point." [Emphasis added]

[67] In this case, the timelines for referral to arbitration were exceeded by nearly four months. By the application of the terms of Articles 17.3 and 18.5 of the Collective Agreement, the grievance is deemed to have been settled and no longer exists. Hence, there is no grievance left to refer to arbitration.

[68] We conclude that the terms of the governing collective agreement provide clear consequences if the mandatory time limits outlined in the grievance procedure are not met. The grievance is deemed to be settled and hence the OLRB had no jurisdiction to proceed with the arbitration on December 9, 2004. We therefore conclude that the interpretation by the Vice-chair of the wording of the collective agreement as directory without a consequence was unreasonable and cannot stand.

The Vice-chair has overstated the legal principle of when mandatory language in a collective agreement may become directive

[69] We conclude that the Vice-chair in para. 53 of his reasons unreasonably misinterprets and makes categorical the principle that mandatory language may become directory.

[70] When this occurs is factually dependant. Brown and Beatty in § 2:3126 merely confirm that,

> [t]he more prevalent view ... is that notwithstanding the imperative character of the word "shall", whether it is mandatory or directory ultimately will turn on the construction of each agreement. For example, where the agreement does not contain an express provision providing for a penalty or does not address the consequence of non-compliance, the provisions will more likely be construed as directory only. [Emphasis added.]

[71] This Court has confirmed that the Brown and Beatty principles relied upon by the Vice-chair are guidelines and are not determinative: see e.g. *Dominion Consolidated Truck Lines Ltd. v. Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 141* (1975), 9 O.R. (2d) 195 (Div. Ct.).

[72] These principles of interpreting mandatory language as directory provide guidance on how a collective agreement may reasonably be interpreted. They are not hard and fast rules. Ultimately, whether a given time limit or procedural requirement is directory or mandatory will, as Brown and Beatty acknowledge, "turn on the construction of each agreement". As noted above in para. 57, in our view the wording of Article 17.2 makes clear that time limits are mandatory.

[73] Indeed, Brown and Beatty go further to note in § 2:3126 that language such as is present in this case will likely bar arbitration:

> However, where the collective agreement provides that "no matter may be submitted to arbitration which has not been properly carried through all previous steps of the grievance procedure", or "if a grievance is not submitted or advanced from one step to another within the time limits … the grievance shall be deemed to be abandoned and all rights of recourse to the grievance procedure shall be at an end", failure to comply with its terms will likely be held to be a bar to arbitration. [Emphasis added.]

[74] The wording in Article 18.5 is almost identical to the quotation above: "No matter may be submitted to arbitration which has not been properly carried through the proper steps of the Grievance Procedure."

[75] We conclude by the terms of the governing Collective Agreement that the grievance was deemed to be settled when the mandatory 14-day time limit was exceeded. The deemed settlement brought the grievance to an end, and the matter could therefore not be referred to arbitration on December 9, 2004.

Applicability of the *Leisureworld* decision

[76] Section 48(16) of the OLRA provides "…an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, despite the expiration of the time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension." [Emphasis added.]

[77] Section 48(16) provides jurisdiction to extend time for the filing of a grievance, but not for referral of the grievance to arbitration.

[78] The Vice-chair confirms at paras. 51 and 54 that the language in this collective agreement is close to that considered in the *Leisureworld* decision and that, as in *Leisureworld*, the grievance and arbitration procedures provided in the agreement at issue are separate and distinct. We agree with this conclusion. The governing collective agreements in *Leisureworld* and in this case are strikingly similar.

[79] In *Leisureworld,* there was an article dealing with grievance procedures that stated, "[i]f arbitration of any grievance is to be invoked, the request shall be made by either party within fifteen (15) days after the date of the reply at Step 2" and "[i]f the Union or any of its representatives fails to observe any of the time limits set out under this grievance procedure, the grievance shall be considered as dropped." In this case, a similar article stated, "the difference may proceed directly to arbitration under the provisions set out in Article 18, within fourteen (14) regular working days from the date the grievance arose, but not later" and "[a]ny grievance submitted … that has not been carried through Article 17 -- Grievance Procedure Clauses and in accordance with the time limits specified, or mutually agreed to, will be deemed to have been settled satisfactorily by the parties of the grievance."

[80] In *Leisureworld*, there was an article that stated "No matter may be submitted to arbitration which has not been properly carried through all previous steps of the Grievance Procedure". In this case, there was a similar article that stated "No matter may be submitted to arbitration which has not been properly carried through the proper steps of the Grievance Procedure." In *Leisureworld*, the Union conceded that the time limit in the collective agreement was mandatory, which was not conceded in this case.

[81] The Divisional Court in *Leisureworld* confirmed that an arbitrator has discretion to extend time limits with respect to *grievance procedures* in accordance with section 48(16), (reproduced at para. 86 below) but an arbitrator has *no discretion* to extend time limits for referral to arbitration. McRae J. concluded:

> 19 The jurisdiction to grant relief from time limitations with respect to grievances cannot and should not be interpreted to also grant relief from the time limits for referral to arbitration. Section 48(16) is clear and unambiguous. To conclude otherwise would mean that the deletion of the words "or arbitration" from the 1995 legislation had no effect whatsoever. The words in the statute must be given their clear meaning. The Board had no jurisdiction to extend the time limit for referral to arbitration. [Emphasis added.]

[82] We agree with the conclusion of the Vice-chair that the *Leisureworld* decision applies, and that section 48(16) of the OLRA is not available to extend the time for referral to arbitration.

James Bay General Hospital and 48(16) not applicable

[83] We disagree with the alternative reasoning of the Vice-chair. He suggests that, if *Leisureworld* does not apply, then relying upon the decision of *James Bay General Hospital*, there is authority to extend time for referral to arbitration pursuant to section 48(16). The Vice-chair provides no analysis as to why *James Bay* may apply. Rather, after finding the processes in the governing collective agreement are separate in accordance with *Leisureworld*, he simply states, "If I am wrong in this finding, then the arbitration process is inextricably linked with the Grievance Procedure, as Arbitrator Devlin and the Divisional Court found in the *James Bay General Hospital* case, and subsection 48(16) applies to it" (para. 54).

[84] *James Bay* is distinguishable from this case by both the terms of the collective agreement in question and by the facts. In *James Bay*, the grievance and arbitration provisions in the collective agreement were clearly inextricably intertwined because referral to arbitration was specifically included as a "step" in the grievance procedure. As well, *James Bay* may be

distinguished from this case on the basis that the equities were in that case persuasive: the union failed to file a grievance by four days due to the fact that the representative had "counted the deadline wrong," but the union had clearly expressed to the employer its intention to refer the matter to arbitration within the time limit.

[85] Moreover, the Vice-chair fails to conduct the required analysis as to why the discretion should be exercised, even if jurisdiction existed. See: *Re Becker Milk, Company Ltd. and Teamsters Union, Local 647* (1978), 19 L.A.C. (2d) 217; *Re Greater Niagara General Hospital and O.N.A.* (1981), 1 L.A.C. (3d) 1 (Schiff); *Metropolitan Separate School Board* (1992), 27 L.A.C. (4th) 154 (Brandt).

[86] Even if section 48(16) of the OLRA applied in this case (which is not our conclusion), it was unreasonable for the Vice-chair to not consider the mandatory statutory criteria of section 48(16) as to whether it was appropriate to exercise the discretion, given the extraordinary delays in this case.

[87] No reasonable grounds for the extension were identified and in our view there are none. Contrary to the Vice-chair's finding, the School Board would be significantly prejudiced. It has been relying in good faith upon the Regulation and the transition provisions pending a determination of the s. 1(4) and s. 69 applications, not just between the date the grievance surfaced on July 27, 2004 and the date of referral to arbitration in December, 2004, but during the entire period that the matter was adjourned *sine die* by the Vice-Chair until the matter was finally determined in January 2009.

Interpretation of meaning of section 133 of the OLRA

[88] The Vice-chair concluded that even if the terms of the collective agreement parallel those of *Leisureworld*, the OLRB still has jurisdiction to extend the time for the referral of a grievance to arbitration pursuant to section 133 of the OLRA.

[89] At paras. 56-64, he accepts the argument made by the Union that the provisions of section 133 give the Board the authority to accept the referral to arbitration regardless of the time limits contained in the collective agreement. The Vice-chair states at para. 58 that "the Board has generally taken the view previously that section 133(1) can be used to relieve a party from any and all requirements of the grievance and arbitration procedure, other than to file a grievance in the first place."

[90] We disagree with these conclusions.

[91] The relevant sections of 133 are:

> Referral of grievance to Board
>
> 133. (1) Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 48, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

Requirements for referral

(2) A referral under subsection (1) shall be in writing in the prescribed form and may be made at any time after the written grievance has been delivered to the other party.

...

Board may refuse

(4) The Board may refuse to accept a referral.

Decision to accept or not

(5) In deciding whether or not to accept a referral, the Board is not required to hold a hearing and may appoint a labour relations officer to inquire into the referral and report to the Board.

Hearing, etc.

(6) If the Board accepts the referral, the Board shall appoint a date for and hold a hearing within 14 days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

...

Jurisdiction of Board

(9) If the Board accepts the referral, the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 48 (10) and (12) to (20) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

[92] We conclude that the interpretation of the Vice-chair as to the intended meaning of section 133 of the OLRA giving wide discretion to the Board acting as arbitrator, is unreasonable for several reasons:

- The interpretation gives the Board the power to extend timelines but an interpretation giving the Board the power to extend timelines undermines the intended purpose of referring arbitration matters in construction grievances directly to the Board, namely speedy resolution of disputes.

- Established interpretations in prior cases confirm that section 133 of the OLRA allows timelines to be truncated not extended.

- The Vice-chair's interpretation of section 133 creates a two-tiered system of arbitration with different sets of rules for arbitration – one with strict time lines that apply for consensual arbitration proceeding in accordance with the collective agreement and another with broad

powers to extend timelines when the parties pursue arbitration before the OLRB.

- A regime of broad unfettered discretion available to the Board sitting as arbitrator creates uncertainty for both unions and employers in time-sensitive situations.

The Vice-chair's interpretation that s. 133 may be used to extend time limits undermines the principle that direct referral to the Board is meant to promote speedy resolution of disputes

[93] A review of the legislative history and case law provides context for the interpretation of section 133.

[94] The unique ability for parties in the construction industry to bring grievances directly to the Ontario Labour Relations Board for arbitration has been in place since amendments made to the OLRA effective on July 18, 1975 (*Labour Relations Act*, S.O. 1975, c. 76). The momentum for these amendments was that the grievance and arbitration procedures reflected in collective agreements were often too long and cumbersome to respond effectively to the pace of disputes in construction matters.

[95] As described by Jeffrey Sack, C. Michael Mitchell, and Sandy Price in *Ontario Labour Relations Board Law and Practice*, 3d ed. Vol. 2 looseleaf (Markham: LexisNexis, 1997) at 10.173, "[b]ecause of the transitory nature of work projects in the construction industry, the normal grievance procedures found in collective agreements proved to be of little value to construction trade unions."

[96] The shortcomings of the grievance and arbitration remedy in the construction industry prior to these enactments had been examined in "The Report of the Royal Commission on Certain Sectors of the Building Industry" (also known as "The Waisberg Report"), which was released in December 1974 (Volume 1 at p. 340):

> Arbitration
>
> Both labour and management complained that current grievance and arbitration procedures are not suitable for the construction industry. There is obviously something wrong when we find that in Ontario the construction industry, which employs about 7 per cent of the total work force, generates only about 1 per cent of the arbitrations. … The unions, apparently frustrated by the slowness and expense of the arbitration procedures, have resorted to the use of wildcat strikes and work stoppages. Matters have now reached the stage where mere threats of such activities are sufficient. Decisions are reached on the basis of expedience.

[97] The Waisberg Report has been cited by the Board as evidence of the ills that the OLRA legislation may have been attempting to remedy: see e.g., *B.S.O.I.W., Local 700 v. Lummus Co. Canada Ltd.*, [1976] O.L.R.B. Rep. 980 ("*Lummus*"). This decision emphasized the need for the OLRA to be interpreted in such a way as to emphasize expediency in the resolution of construction industry disputes, at para. 8: "We do not hold it consistent with the aims of the Legislation … that a grievor may malinger with impunity in bringing its dispute to a resolve. In our opinion, the Board would be duty bound to require a grievor to provide a reasonable explanation for any delay in the processing of a grievance before us."

[98] Discussion regarding the right to refer arbitration to the OLRB has since focused on the need for expediency in the resolution of these grievances.

[99] In *Gottardo Masonry & Contracting Ltd.*, [1998] O.L.R.D. No. 2363, the OLRB confirmed the purpose of the s. 133 process as follows:

> 17 ... In the construction industry time is of the essence as the duration of any job can be quite short. It has therefore been considered important to resolve any construction workplace issues as quickly as possible to properly preserve the rights of all parties to a dispute. This is the reason why the Act allows a party to a grievance in the construction industry to file an application for arbitration and to get a hearing 14 days from the date of application.

[100] Similarly, in *Electrical Power Systems Construction Association*, [1990] OLRB Rep. March 243, the OLRB confirmed at para. 51:

> Under the scheme of the Act, disputes in the construction industry that come before the Board are to be dealt with quickly. The Legislature has particularly recognized that expeditious resolution in this industry is to be encouraged, and this need for expedition is a major reason the legislature gave the Board jurisdiction to hear arbitrations. We need look no further than the provisions of section 124 [now s. 133] to observe the legislative directive for expedition; section 124(2) allows parties to apply to the Board immediately after delivery of the written grievance, notwithstanding any restrictions in the collective agreement in this regard, and further, requires the Board to hold a hearing within 14 days of receipt of the section 124 referral. Thus, sound labour relations policy considerations in the construction industry require that, in the absence of special circumstances, parties making referrals to the Board pursuant to section 124 must act expeditiously. To exercise our discretion otherwise would undercut the very purpose of this statutory arbitration scheme. [Emphasis added.]

[101] In *Standard Underground High Voltage*, [1997] O.L.R.D. No. 3479, the OLRB considered a request for it to exercise its discretion under s. 48(16) and noted the following at para. 20:

> [T]he nature of the construction industry requires that parties conduct themselves in a manner that reflects considerably greater expedition than might otherwise be applied in an industrial context. As was noted by the Board (admittedly in another context, but with applicability to the instant proceeding) in ROBERT DUMEAH [1994] O.L.R.B. Rep. June 655, at para. 61:
>
> > ... Employers in the construction industry must know quickly if challenge is to be made about the operation of their business. Unions must know quickly if a member is going to assert his referral to or discharge from an employer was improperly managed or instigated by the union. Eight months is too long to wait. Work in the industry is too fluid and occasional to impose on parties an industrial standard of "delay". In construction, both employer and union need to know where they stand, and to move on. To sanction disruption months after the event would be significantly disruptive to their relationship and unduly expensive and obstructive. [Emphasis added.]

The Vice-chair's interpretation of section 133 is contrary to precedent that allows the arbitrator to shorten time limits in a collective agreement, but not for time to be extended

[102] The Vice-chair refers to the 1998 amendments to the OLRA, which added sections 133(4), (5) and (6), as a basis for his conclusion that section 133 should be interpreted as giving the OLRB sitting as arbitrator broader powers of unfettered discretion quite different from the powers of an arbitrator appointed under a collective agreement. The Vice-chair concludes at para. 60 that the effect of the addition of these subsections is that "[i]t appears … that the Act has moved in different directions for arbitrators acting under section 48 and the Board acting as arbitrator under section 133. Given the nature of the construction industry, discussed below, this makes good labour relations sense."

[103] The Vice-chair confirms that section 133 should be interpreted very differently from the cases proceeding before arbitrators appointed pursuant to section 48(16) of the OLRA. He reaches the conclusion at para. 62 that the OLRB has wide jurisdiction and flexibility not available to section 48 arbitrators:

> That unfettered discretion is consistent with the role that the Board has been given by the Act. The Act deals in far greater detail with the construction industry than any other. The construction industry provisions of the Act amount to 40% of the length of the statute, and of course the general portions of the Act apply to the construction industry unless specifically displaced. This reflects the volatility of the construction industry and the particular labour relations issues that are unique to it. The Board is given a wider jurisdiction under section 133 than arbitrators under section 48 because it needs the flexibility to be able to consider all of the issues that may arise and that are connected in real and practical terms that do not always fit neatly with in the general provisions of the Act. For that reason, I consider that the provisions of subsections 133(1) and (4) do give the Board the discretion not to accept a referral of grievance to arbitration on any grounds that are consistent with the proper administration of the collective agreement and the Labour Relations Act to the parties and to the industry as a whole. Delay and prejudice are clearly relevant, but other factors may be as well. [Emphasis added.]

[104] We disagree with these conclusions.

[105] There is an established line of cases that interprets the broad wording of section 133 as simply empowering the OLRB to hear arbitrations on an expedited basis, without giving the OLRB broader or different powers to extend time lines stipulated in a collective agreement. These cases include *Centro Masonry Ltd.*, [1997] O.L.R.D. No. 2267 ("*Centro*") and *Ontario Power Generation* [2003] O.L.R.D. No. 1835.

[106] We conclude that s. 133 should be interpreted as simply providing the OLRB with jurisdiction to deal with referrals to arbitration according to the rules that apply to arbitrators appointed by the parties pursuant to the collective agreement. This is clear by the terms of section 133(9).

[107] The OLRB as arbitrator may shorten time limits stipulated in the collective agreement where appropriate to respond to the need for speed in determining construction disputes. Time

limits may only be extended where they form part of the grievance process as contemplated by s. 48(16) of the OLRA and *Leisureworld.*

[108] This view of the limited purpose of section 133 is confirmed in Jeffrey M. Andrew's *Labour Relations Board Remedies in Canada*, looseleaf, 2nd ed. (Aurora: Canada Law Book, 2009) at 21:0100, where the OLRB's role is described:

> In the case of Ontario [s. 133], the board's power to arbitrate disputes under a collective agreement in the construction industry incorporates by reference provisions giving statutory power to arbitrators [s. 133(9)]. While the jurisdiction is statutory, rather than based on the agreement, the process is a form of grievance arbitration. The board's role is to fulfill the role of an arbitrator under the process set up by the parties under their agreement. The board looks primarily to the agreement, therefore, although it construes the agreement in light of statutory policy.

[109] We are of the view that the decisions of *Centro* and *Ontario Power Generation* (2003) correctly interpret the intended scope of s. 133 and the powers of the Board in the role of arbitrator under the OLRA. As stated in *Centro* at para. 32:

> There is no doubt that one of the statutory purposes of section 133 is to provide an alternative process which is expedited in comparison with the consensual process contemplated by a collective agreement (note for example the 14 day time-frame for holding a hearing in section 133(2)). There is little justification however to permit the alternative expedited process to be used to delay or prolong disputes that would have been addressed in a more timely fashion if the provisions of the collective agreement were to have been adhered to. [Emphasis added.]

[110] In *Ontario Power Generation* (2003) at para. 14, the three member panel of the OLRB concluded:

> ... Section 133(9) incorporates, among other sections, section 48(16). If section 133(1) meant that time limits are irrelevant, then there would be no need to incorporate section 48(16). The prejudice suffered by a responding party in having a grievance heard more quickly than it might have expected is small, unworthy of much protection, and easily dealt with by way of an adjournment, if necessary. The prejudice which may result from delay is not so easily dealt with and may be irreparable. We conclude that section 133 does not operate to eliminate or extend indefinitely any time limit in a collective agreement. [Emphasis added.]

[111] The Vice-chair relies upon another line of cases interpreting section 133 more broadly including *Ontario Hydro*, [1987] OLRB Rep. Apr. 574 ("*Ontario Hydro* (1987)"), *Lummus*, and *Consomar [sic, Consamar] Inc.*, [1991] OLRB Rep. Sept. 1021.

[112] He suggests *Ontario Hydro* (1987) supports the view that "[t]he Board has generally taken the view previously that section 133(1) can be used to relieve a party from any and all requirements of the grievance and arbitration procedure, other than the need to file a grievance in the first place" (para. 58).

[113] However, it appears that the Vice-chair has misinterpreted *Ontario Hydro* (1987). The case confirms that time limits may be shortened to facilitate the intended purpose of section 133, but not extended. The passage quoted by the Vice-chair, taken from para. 22 of the *Ontario Hydro* (1987) decision, confirms that non-compliance with the timelines stipulated in the parties' collective agreement is still intended to have consequences:

> Having regard to the expedition which section 124 [now s. 133] was intended to impose on the grievance and arbitration processes in the construction industry and on the parties to those processes, we are satisfied that the analysis in paragraphs 6 and 7 of the *Lummus* decision fully support the proposition that the opening words of subsection 124(1) relieve the referring party from compliance with any collective agreement requirements that steps be taken after the delivery of the written grievance before there can be a referral to arbitration. We are not satisfied, however, that either the need for expedition or the analysis in paragraphs 6 and 7 of *Lummus* support the proposition that the opening words of subsection 124(1) [now s 133] should be taken to relieve the referring party from the consequences of non-compliance within an agreed time limit for the delivery of a grievance. ... There is no inconsistency between the concern for expedition reflected in section 124 and the enforcement of the parties' own standards for expedition in delivering a written grievance. We conclude that the opening words of subsection 124(1) do not render a contractual time limit for the initial delivery of a grievance nugatory when the grievance is referred to this Board for arbitration under section 124. If the decision in *Lummus* holds otherwise, we respectfully decline to follow it. [Emphasis added.]

[114] Similarly, the reference to *Lummus* does not support the conclusion that time limits in a collective agreement may be superceded by s. 133. In *Lummus*, the Board found that s. 133 provides a separate procedure for the settlement of a construction dispute apart from the mechanisms that might be contained for referring a grievance to consensual arbitration under a collective agreement. In this sense, s. 133 does not require compliance with all steps of the grievance procedure to have been effected before a party will be entitled to bring an application for arbitration to the Board. The Act allows parties to proceed *directly* to the Board without proceeding first through the steps contemplated in the collective agreement:

> 6 The Board in its decision dated December 31, 1975 indicated "that the plain intent of section 112(a) of the Act is to establish a dispute settling mechanism separate and apart from any grievance and arbitration procedure provided under the terms of the subsisting collective agreement...". In making this ruling we were compelled by the clear and simple wording of the Legislation. Furthermore our ruling purports to reflect the underlying objective of the Legislation in providing a speedy process for resolving disputes arising out of the interpretation of collective agreements negotiated in the construction industry. ...
>
> 8 ... The Board is satisfied that the Legislation contemplates the filing of a reference immediately after delivery of the grievance to the other party or at any stage of the grievance procedure if pursued under the terms of the agreement. ... We do not hold it consistent with the aims of the Legislation, however, that a grievor may malinger with impunity in bringing its dispute to a resolve. In our opinion, the Board would be duty bound to require a grievor to provide a reasonable explanation for any delay in the processing of a grievance before us. [Emphasis added.]

[115] *Lummus* confirms that section 133 allows a party to by-pass the steps and timelines stipulated for grievance and arbitration in the collective agreement, but provides no authority for the extension of timelines. Therefore, *Lummus* is not supportive of the position taken by the Vice-chair.

[116] Finally, we are of the view that the decision of the OLRB in *Consamar* does not support the Vice-chair's interpretation of section 133. Review of *Consamar* reveals that the parties did dispute what interpretation was to be given to the opening words of s. 124(1) (the predecessor to s. 133(1)), and whether the *Lummus* and *Ontario Hydro* (1987) determined that the collective agreement provisions could be discarded entirely: see paras. 6, 14. However, the OLRB found at para. 27 that s. 44(6) (predecessor to s. 48(16)) was satisfied on the facts of the case, so it expressly declined to settle the issue of whether time limits remain relevant.

The interpretation by the Vice-chair creates a two-tiered system of arbitration and creates uncertainty

[117] The Vice-chair concluded that section 133 gives to the Board broad discretion that the Union refers to as "superpowers" that may be used to override the terms of the parties' collective agreement. The jurisdictional restrictions imposed on a consensually appointed arbitrator by s. 48 of the Act under this view do not bind the jurisdiction of the OLRB when it is acting as construction-industry arbitrator. This interpretation creates a two-tiered system of arbitration that does not make sense and that will create uncertainty for unions and employers alike. This interpretation undermines the purpose of being able to expedite the arbitration process by direct referral to the Board.

[118] We conclude that the Vice-chair has misinterpreted the meaning of section 133, and that his interpretation is unreasonable

Conclusion

[119] As the Supreme Court made clear in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, reviewing a decision for reasonableness requires the court to inquire into both to the process of articulating the reasons and to outcomes, to determine whether the qualities of justification, transparency and intelligibility are present.

[120] We conclude for the reasons that we have outlined that, although the Board is entitled to deference, the various components of the Jurisdiction Decision do not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[121] For all of the reasons outlined, we conclude that the Jurisdiction Decision is unreasonable as the OLRB had no jurisdiction to hear the grievance on any basis.

The Arbitration Decision

[122] In light of our conclusion that the Vice-chair did not have jurisdiction to hear the grievance for the reasons outlined, the Arbitration Decision is quashed for lack of jurisdiction.

[123] In light of our findings, we need not embark upon a detailed analysis of the reasonableness of the Arbitration Decision.

[124] We are of the view that, if the Jurisdiction Decision is upheld, the estoppel argument raised by the School Board probably must fail in light of the letter sent by counsel on June 14, 2004 referred to in paragraph 30 herein.

Costs

[125] The parties agreed that the successful party would be entitled to costs of this proceeding fixed in the amount of $10,000.00 inclusive of HST and disbursements. The Union shall pay this amount to the School Board. The OLRB is not seeking costs.

0579-08-R; 0580-08-R; 1662-09-R (Court File No. 551/10) National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) -and- **Pharma Plus Drugmarts Ltd.**, Pharmx Rexall Drug Stores Ltd., Katz Group Canada Ltd., United Food and Commercial Workers International Union, Local 175 and OLRB

Judicial Review – Intervenor – Natural Justice – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer

was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

Superior Court of Justice (Divisional Court), R.G. Thomas, L. Ferrier, J. Wilson JJ., October 4, 2011

J. WILSON, J.

REASONS FOR JUDGMENT

The Application

[1] The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) ("CAW") brings this application for judicial review of four related decisions of Brian McLean, Vice-chair of the Ontario Labour Relations Board (the Board), made in 2009 and 2010. The respondents Pharmx Rexall Drug Stores Ltd. ("Rexall") and Pharma Plus Drugmarts Ltd. ("Pharma Plus") are owned by the respondent Katz Group Canada Ltd. (collectively, "the Employers").

[2] The United Food and Commercial Workers International Union (the "UFCW") brought two related employer applications pursuant to section 1(4) of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1 ("the OLRA") for Pharma Plus and Rexall stores in Peterborough and Hamilton, Ontario.

[3] Prior to the settlement that is the subject of the April 7, 2009 decision of the Board, CAW represented Pharma Plus employees in 21 stores in the Ottawa region. UFCW represented Pharma Plus employees in 160 stores across Ontario, excluding Ottawa/Carleton.

[4] CAW received no notice of a settlement between UFCW and the Employers that declared Rexall and Pharma Plus to be a related employer, and that also declared UFCW to be the sole collective bargaining agent for all Rexall employees in Ontario, including future stores in the Ottawa region.

[5] Specifically, the four decisions of the Board that are the subject of this judicial review application determined as follows:

- on April 7, 2009, the Board confirmed a settlement between the Employers and UFCW of the two outstanding related employer applications brought for Peterborough and Hamilton, as well as other certification issues between the parties. The settlement and the section 1(4) declaration exceeded the relief requested by the UFCW in the applications. It confirmed that Rexall and Pharma Plus are a single employer for the purposes of the OLRA and that UFCW is the sole collective bargaining agent for Rexall employees in all of Ontario ("the April 7, 2009 Decision");

- on October 29, 2009, the Board denied CAW's request for reconsideration of the settlement approval on the basis that CAW had no direct interest in the settlement, but provided the

employees of a Rexall store in Ottawa ("the Beaverwood Road store") who were impacted an opportunity to make submissions through their representative, CAW ("the October 29, 2009 Decision");

- on June 8, 2010, the Board varied the April 7, 2009 Decision to exclude its application to the Beaverwood Road employees, on the basis that they had not been given notice of the initial proceedings and they had brought their objection in a timely manner. The Board also dismissed an application brought by CAW pursuant to section 66 of the OLRA for being moot ("the June 8, 2010 Decision"); and

- on September 27, 2010 the Board refused CAW's request that it reconsider the scope of the June 8, 2010 Decision ("the September 27, 2010 Decision").

The Dispute

[6] On April 27, 2009, after having become aware of the April 7, 2009 Decision, CAW filed a Response and Request for Reconsideration regarding the related employer applications challenging the scope of the relief granted to UFCW insofar as it included bargaining rights for Rexall employees in the Ottawa region.

[7] It is the position of CAW that, at a minimum, it should have received notice of the application to endorse the settlement between the employers and UFCW that led to the April 7, 2009 Decision. CAW had represented the Pharma Plus stores in Ottawa for many years, and the related employer declaration should have recognized, or at least provided CAW an opportunity to speak to the Board of, this established relationship.

[8] CAW asserts that it was directly affected by the April 7, 2009 Decision for two reasons.

[9] First, CAW claims that its members' rights may be threatened by the expansion of Rexall stores in Ottawa (represented by UFCW) at the expense of the existing Pharma Plus stores in Ottawa (represented by CAW).

[10] Second, CAW submits that it should have been given an opportunity to make submissions about the scope of the proposed remedy and whether Ottawa should have been included in the related employer declaration made in favour of UFCW.

[11] Although CAW did not represent any Rexall employees at the time the matter first came before the Board, CAW had made unsuccessful attempts, which were rebuffed by the Employers, to seek certification of the only Rexall store in the Ottawa Region at the time, located on Beaverwood Road, in 2005 and again during the labour negotiations with the Employer in 2008. CAW and the Employer entered into a written agreement on October 24, 2008 with respect to terms that would apply if CAW was in the future successful in obtaining certification of the Beaverwood Store.

[12] It is the position of UFCW and the Employers that CAW was not entitled to notice of the application that led to the April 7, 2009 Decision.

[13] CAW submits that the Board erred in several ways.

- First, it was unreasonable for the Board to give no reasons for its April 7, 2009 decision.

- Second, the Board decision, dated October 29, 2009, that CAW had no direct interest and thus no ground for standing in UFCW's applications was unreasonable.

- Third, the Board misapplied s. 1(4) of the OLRA when it granted UFCW province-wide rights as an appropriate remedy in the facts of this case.

- Fourth, the Board unreasonably found a related s. 66 termination application brought by CAW to be moot.

[14] The responding parties take the view that the decisions of the Board must be read and considered together as one decision. The reasons of the Board are entitled to significant deference and are reasonable. The application for judicial review ought to be dismissed.

Background Facts

[15] Prior to the April 7, 2009 Decision of the Board:

- employees of Pharma Plus stores in most of Ontario, except Ottawa, were represented by the UFCW;

- employees of Pharma Plus stores in Ottawa were represented by CAW;

- employees of Rexall stores in Ontario were, in general, not unionized, but UFCW did hold bargaining rights for eight stores; and,

- the employees of the only Rexall store in Ottawa (Beaverwood Road) were not unionized, and the Employers had resisted the efforts for certification initiated by CAW in 2005 and 2008.

[16] Employees of any new Pharma Plus stores opened outside Ottawa would have automatically been represented by UFCW according to the provincial collective agreement in place at the time. Employees of any new Pharma Plus stores in Ottawa would have been represented by CAW.

[17] Katz Group Canada Ltd. began to open or refurbish certain drugstores in Ontario and to operate those stores under the non-unionized Rexall name, rather than the unionized Pharma Plus banner.

[18] UFCW took the position that the opening of Rexall stores in this manner violated its collective agreement with Pharma Plus and threatened its members. Consequently, UFCW initiated the two Related Employer Applications in Peterborough and Hamilton pursuant to s. 1(4) of the OLRA, asserting that the collective agreement between UFCW and Pharma Plus would bind employees in Rexall stores in these locations.

[19] Section 1(4) of the OLRA provides as follows:

> Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

[20] The Employers vigorously defended the Related Employer Applications.

[21] CAW did not initiate a related employer application at this time. CAW was unaware of the two Related Employer Applications initiated by UFCW.

[22] UFCW took steps to certify nine Rexall stores across the province. The efforts of UFCW were contested by the Employers, but certification occurred in eight of the contested locations.

[23] CAW took steps to certify the one Rexall store in the Ottawa region that was successfully challenged by the Employers.

[24] After the variety of contested proceedings between the employers and UFCW, the Employers and UFCW on March 26, 2009 reached a comprehensive agreement that resolved all outstanding differences between them as part of the mediation offered by the OLRB. The settlement included the original two Related Employer Applications regarding the Peterborough and Hamilton locations, and an agreement about a ninth Rexall Store that was not yet certified.

[25] Counsel for UFCW confirmed that the settlement was a "new deal", not asked for nor anticipated, which evolved as a result of the negotiations. The document filed for approval before the Board contained many handwritten changes to the typed version of the proposed agreement.

[26] The settlement provided that UFCW was to be the sole collective bargaining agent for all Rexall drug stores in all of Ontario, including Ottawa/Carleton. This was not a result that could have been achieved had the applications proceeded before the Board for adjudication.

[27] The settlement went beyond what had been requested by UFCW in the two Related Employer Applications, and was qualitatively different from the initial starting point of UFCW in the negotiations.

[28] As well, the settlement contemplated a new collective agreement for new Rexall stores, with terms that were less advantageous to the employees as compared to either the existing

UFCW-Pharma Plus or CAW-Pharma Plus collective agreements. Again, this was not a result that could be obtained in a contested proceeding before the Board.

[29] The exchange of the "gold" Pharma Plus collective agreement for the "bronze" proposed Rexall collective agreement for future Rexall stores benefited the Employers. UFCW benefited in the settlement by obtaining bargaining rights for all future Rexall stores across the province, including stores in Ottawa/Carleton where it had not traditionally held bargaining rights for Pharma Plus stores.

The Beaverwood Road Rexall Store in Ottawa/Carleton

[30] As mentioned above, CAW attempted in 2005 to certify the only Rexall store within the Ottawa/Carleton geographic area, which was located at Beaverwood Road. The Employers resisted these attempts to certify the Beaverwood Road employees. During the collective agreement negotiations between CAW and the Employer in 2008, the Employers refused to bring the Beaverwood Road store under the CAW-Pharma Plus banner, but agreed in a written agreement dated October 24, 2008 to allow CAW to renew its certification efforts with terms.

[31] The "Letter of Understanding" established between CAW and the Employers on October 24, 2008 provided:

> The Company Agrees as follows:
>
> 1) The Union shall attempt to organize the Rexall store at in [*sic*] Manotick, located at 1160 Beaverwood Road, Manotick, Ontario.
>
> 2) The normal requirements under the Labour Relations Act of Ontario, with respect to Organizing shall apply.
>
> 3) In the event that the Union has sufficient support to allow for Unionization, the Company agrees this store shall fall under the current Collective Agreement between Pharma Plus Drugmarts Ltd. and the CAW.
>
> ...
>
> 6) This settlement is made on a without precedent or prejudice basis to either parties position with respect to future stores that may be opened other [*sic*] a Banner other than a Pharma Plus store.

[32] It was the position of the Employers in the Reconsideration Application that the April 7, 2009 Decision terminated any rights that CAW may have had in the Letter of Understanding. They submitted that, "In light of the Boards order, dated April 7, 2009, the foregoing letter is now exhausted and void; the UFCW was awarded representation rights with respect to that store [on Beaverwood Road]."

[33] On August 29, 2009, CAW filed a separate application for certification as bargaining agent for employees of the Rexall store on Beaverwood Road in Ottawa.

[34] CAW then added an additional challenge to its application for certification on September 10, 2009, by applying for termination of the bargaining rights acquired by UFCW in the March 26 agreement under s. 66 of the Act ("the Termination Application").

[35] Section 66(1) provides:

> Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 18 (3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

[36] The Termination Application was based on the argument that UFCW had been voluntarily recognized as bargaining agent by the Employers and majority support of the affected employees had not been obtained as required by the OLRA. CAW challenged the settlement as being advantageous to both the Employers and UFCW at the expense of the Rexall employees across Ontario, who were now granted reduced benefits under the new collective agreement.

Review of the Board Decisions

The April 7, 2009 Decision

[37] On April 7, 2009, the Board approved the settlement between the Employers and UFCW based upon written submissions without a hearing. The Board granted the relief requested in the settlement, giving UFCW province-wide rights to all future Rexall stores. The Board did not give any reasons or detail the contents of the submissions it had been provided. The issue of extending the rights of UFCW to include Ottawa/Carleton was not specifically dealt with by the Board.

[38] On April 27, 2009, CAW brought a Request for Reconsideration of the April 7, 2009 Decision, which was dealt with by the Board in the October 29, 2009 Decision.

The October 29, 2009 Decision

[39] The Board determined in the Request for Reconsideration that CAW had not been entitled to notice of the settlement between UFCW and the Employers because the April 7, 2009 Decision did not affect CAW bargaining rights. It did not, at the time the reconsideration was requested, represent any employees who were "affected by the related employer applications or the settlement", and the settlement "did not affect the CAW bargaining rights as they existed at the time" (para. 8). In the Board's view, "[t]he only thing [the settlement] does do, is to likely preclude any s. 1(4) application against Pharma Plus and Rexall in Ottawa that the CAW might have (but had not) brought" (para. 11).

[40] Consequently, the Board went on to conclude that CAW did not have a right to intervene and make submissions on the Related Employer section 1(4) applications.

[41] The Board did note, however, that "the employer settled the applications in a way that gave the union [UFCW] a better result than it could have got had it been successful at hearing" (para. 2).

[42] The Board concluded that, "[w]hile CAW does not have a direct interest in the matter it represents employees of the Beaverwood Road store who do have a direct interest in the matter" (para. 12).

[43] The Board concluded that "[s]ince [the employees] were employed in Ottawa at stores not covered by the related employer applications these employees would not have been given notice of the related employer applications" (para. 12). As they only found out about the proceedings when the employees learned that UFCW now represented them, these employees were given a right to be heard and a right to review the pleadings, represented by CAW.

The June 8, 2010 Decision (incorrectly labeled June 8, 2009 by the Board)

[44] The June 8, 2010 Decision considers the Termination Application brought by the CAW and the submissions of the Beaverwood Store employees represented by CAW.

[45] The Board again affirms that CAW did not receive notice of the Related Employer Applications as the "application did not affect the CAW or employees it represented" (para. 4).

[46] The Board then considered the submissions of CAW filed on behalf of the Beaverwood Road store employees. Their request for reconsideration was granted and the April 7, 2009 Decision was varied to exclude its application to the Beaverwood Road Rexall store employees.

[47] The Board found that, as the employees did not receive notice of the application, and as they complained promptly, they should be carved out of the ambit of the April 7, 2009 Decision.

[48] Specifically, the Board found that the Board erred in not ensuring that the Beaverwood Store employees did get notice:

> 8 The circumstances which gave rise to this situation are unusual. The original two 1(4)/69 applications were filed with respect to stores in Peterborough and Hamilton. In its cover letter with respect to both applications, counsel for the UFCW specifically requested that the Board (and employers) give notice to the affected employees: "The responding parties will need to post notices of the respective applications in the appropriate stores.". The Board directed the employer to post notice to employees (and would have without the applicant's request) in accordance with its usual practice in such applications. The employer advised the Board that it had posted notice in the stores in Peterborough and Hamilton.
>
> 9 The difficulty arose because subsequent to the filing of the 1(4)/69 applications the UFCW and responding party employers settled the matter in a

> way which affected employees in locations other than the original applications. Unfortunately, the Board did not ensure that those additional employees received notice that the Board may make a decision which affected their rights. However, only the Beaverwood Road store employees complained, and they did so within a reasonable period time [*sic*]. [Emphasis added.]

[49] The Board dismissed the CAW's Termination Application as being moot.

[50] After the June 8, 2010 Decision, the Board permitted the CAW application for certification at the Beaverwood Road store to proceed. CAW was certified as the bargaining agent for the Beaverwood Store Rexall employees.

The September 27, 2010 Decision

[51] CAW sought reconsideration of the June 8, 2010 decision and the dismissal of the Termination Application as moot.

[52] The Board dismissed the request, stating that "[m]uch of the request for reconsideration is largely an attempt to re-argue the case" (para. 3).

[53] The Board disagreed with the CAW submission that it had failed to deal with the termination application. The Beaverwood Road employees in the Ottawa area could have an interest in termination but they received "a full remedy" when they were carved out of the April 7, 2009 Decision. The Board took the view that those employees could obtain no "greater remedy" than being excluded from the application of the UFCW Rexall collective agreement. Therefore the Board concluded in reconsideration that application had properly been found moot.

[54] Implicit in the Board decision is that CAW could not pursue rights on behalf of Rexall employees outside Ottawa.

[55] On November 12, 2010, CAW filed the Notice of Application to Divisional Court for Judicial Review.

Standard of Review:

[56] In this case, all parties agree that the appropriate standard of review for a decision of the Board under s. 1(4) or section 66 of the OLRA is reasonableness.

[57] However, if there is a breach of natural justice in proceedings before the Board by failing to provide CAW with notice, there is no applicable standard of review. The question for a reviewing court is whether the rules of procedural fairness were respected in the circumstances: *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 (C.A.), at para. 10; *Board of Health for Simcoe Muskoka District Health Unit v. Ontario Nurses Association*, 2011 ONSC 4045 (CanLII), 2011 ONSC 4045 (Div. Ct.), at para. 18.

The Issues

[58] Three interrelated questions must be answered:

1. Was CAW entitled to notice of and to participate in the initial s. 1(4) OLRA application before the Board?

2. Was the Board reasonable in its determination that CAW must have a direct existing interest by representing Rexall employees in order to be entitled to notification and the right to participate in the Related Employer Application in the facts of this case?

3. If a direct interest is required, was the Board's conclusion reasonable in the facts of this case that CAW did not have a direct interest in the matter before the Board?

Analysis

[59] As outlined above, CAW submits that the Board erred in several ways.

- First, it was unreasonable for the Board to give no reasons for its April 7, 2009 decision.

- Second, the Board decision dated October 29, 2009 that CAW had no direct interest and thus no standing in UFCW's applications was unreasonable.

- Third, the Board misapplied s. 1(4) of the Act in granting UFCW province-wide rights as an appropriate remedy in the facts of this case.

- Fourth, the Board unreasonably found a termination application brought by CAW to be moot.

[60] We can deal summarily with the first and forth issues raised.

[61] We conclude it was not unreasonable for the Board initially in adopting a settlement reached between the parties to not provide reasons for its April 7, 2009 Decision. The parties did not appear before the Board and it would be unusual in approving a settlement to give reasons. This ground is without merit.

[62] With respect to the forth issue, we conclude that it was not unreasonable for the Board to conclude that the Termination Application with respect to the Beaverwood Store was moot, as the Board had carved out this store and its employees from the ambit of the April 7, 2009 Decision. It was not unreasonable to dismiss the request for CAW to represent employees outside the geographic region of Ottawa.

[63] The other issues raised by CAW – that is, the absence of notice, and the conclusions that CAW had no direct interest and hence no entitlement to notice or to an opportunity to

challenge the scope of the s. 1(4) remedy granted by the Board in the April 7, 2009 decision – are problematic.

Procedural fairness and the question of notice

[64] The Board concluded, in accordance with the submissions of the Employers and UFCW, that CAW must have a direct interest in the matter before the Board on April 7, 2009 to trigger an obligation to provide notice of the approval of the settlement. The Board in sparse reasons cited no authority for its conclusions. The Board required CAW to have established bargaining rights for Rexall employees to be entitled to notice and to have the right to participate as intervenor to reopen the section 1(4) Related Employer application.

[65] There does not appear to be any precedent directly on point dealing with the approval of a settlement by the Board between an employer and a union, which has by agreement "bumped" the potential future rights of a competitor union.

[66] We return then to basic principles.

[67] Counsel for UFCW argued that notice and fairness principles apply perhaps in other contexts, but in the labour law context the reality is that it is a 'rough and tumble' world with few guidelines. Tough tactics are in play and the union that is the swiftest wins.

[68] A review of the case law does not appear to support the position of UFCW and the Employers.

[69] The courts have recognized a requirement that basic procedural norms of fairness be respected in labour proceedings and arbitrations. This includes a general rule that all interested parties be able to participate, and that third parties whose rights could be adversely impacted by an award be given notice beforehand: Brown & Beatty, *Canadian Labour Arbitration*, 4th ed., looseleaf (Aurora, Ont.: Canada Law Book, 2011) §1:5220, 3:1200, 3:1210.

[70] The right to notice in a proceeding, be it a lawsuit, an administrative proceeding, or a labour proceeding, is a fundamental principle of fairness. Notice is part of the core of natural justice, the requirements of which will depend upon the circumstances of the case. In each case, the court must determine whether the party claiming the right to notice had a sufficient interest in the proceedings such that notice was required by the *audi alteram partem* principle: see, e.g. *T.W.U. v. Canadian Radio-Television & Telecommunications Commission*, 1995 CanLII 102 (SCC), [1995] 2 S.C.R. 781, at para. 6; *Inuit Tapirisat of Canada v. Canada (Attorney General)*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735, at para. 27; *Canadian Transit Co. v. Canada (Public Service Staff Relations Board)*, [1989] 3 F.C. 611 (C.A.), at paras. 9-10.

[71] An indirect or contingent interest may be too remote and not sufficient to entitle one to notice: *T.W.U.*, *supra*, at para. 31-32; *Canadian Transit*, *supra*, at para. 26. However, the right to notice does not depend on proof of existing vested rights. The *potential* effect of a legal proceeding upon a third party may be sufficient to trigger the right to notice. As noted by arbitrator Owen Gray in *Weston Bakeries Ltd. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1999), 79 L.A.C. (4th) 189:

> 11 The potential effect on a third party of the outcome of a legal proceeding between others may be so direct and substantial that that third party is entitled as a matter of natural justice to participate as a party in the proceeding. Even if the potential effect on a third party is not so direct and substantial as to give the third party a legal right to participate, the tribunal may have a discretion to permit the third party's participation on such terms as it may consider appropriate. Labour arbitrators have the discretion to permit participation by employees or others whose interest in the matter may not be so direct and substantial as to be entitled to participate as a matter of natural justice: see *Somerville Industries Ltd.*, [(1969), 20 L.A.C. 404 (Ont. Arb. Bd.)]. [Emphasis added.]

[72] If based upon reason, common sense and fairness a party ought to have been advised of matters that may impact upon their interests as the party may be significantly affected, or directly and necessarily affected, by the decision, then the party will be entitled to notice: *C.U.P.E. v. Canadian Broadcasting Corp.* (1990), 70 D.L.R. (4th) 175 (Ont. C.A.), aff'd 1992 CanLII 108 (SCC), [1992] 2 S.C.R. 7; *Weston Bakeries Ltd. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1999), 79 L.A.C. (4th) 189 (Ont. Arb. Bd.).

[73] We conclude for the reasons to follow that the Board breached the duty of procedural fairness by unreasonably imposing the prerequisite requirement that CAW be the union certified to represent existing Rexall employees in Ottawa in order to be entitled to notice of the section 1(4) Related Employer Application.

The Case Law defining interested parties entitled to notice in the labour context

[74] Most of the cases considering the right of interested third parties to participate in labour matters have stemmed from two root decisions: *Hoogendoorn v. Greening Metal Products & Screening Equipment Co.*, 1967 CanLII 20 (SCC), [1968] S.C.R. 30, and *Bradley et al. and Ottawa Professional Fire Fighters Association et al.*, [1967] 2 O.R. 311 (C.A.). *Bradley* was itself cited with approval in the majority judgment in *Hoogendoorn*.

[75] Hall J. in *Hoogendorn* confirmed that an employee whose status was being affected by the grievance hearing was entitled to be represented in his or her own right, as distinct from being represented by the union, where the union was taking a position adverse to the employee's interests. For similar circumstances, see: *Orillia Soldiers' Memorial Hospital v. O.N.A.* (1993), 34 L.A.C. (4th) 315 (Ont. Arb. Bd.); affirmed 1997 CarswellOnt 662 (Ont. Div. Ct.); *Freeport Hospital v. Ontario Nurses Association* (Craven, Dec. 21, 1993) [ref'd by Div Ct above]; *Diversicare Inc. v. O.N.A.* (1995), 47 L.A.C. (4th) 284 (Ont. Arb. Bd.).

[76] The principle that an "interested" third party may intervene has been expanded beyond unionized employees to include other employees whose behaviour is at issue in the grievance, as well as government officials, independent contractors, and third party employers: see e.g. *C.U.P.E., Local 101 v. London (City)* (2004), 131 L.A.C. (4th) 56 (Ont. Arb. Bd.); Brown & Beatty, §3:1210; and Gorsky, Usprich & Brandt, *Evidence and Procedure in Canadian Labour Arbitration*, looseleaf (Toronto, Ont.: Thomson Carswell, 1994-), §7.3(b)(iii).

[77] The most persuasive case similar to the facts before us is *C.U.P.E. v. Canadian Broadcasting Corp.* (1990), 70 D.L.R. (4th) 175 (Ont. C.A.), aff'd 1992 CanLII 108 (SCC), [1992] 2 S.C.R. 7 ("*C.U.P.E.*"). The Court of Appeal concluded in that case that two third party

unions had been entitled to notice of certain arbitral decisions. The awards were overturned on the basis that "the failure to give notice of the arbitration to the Canadian Union of Public Employees and to the National Assn. of Broadcast and Electronic Technicians when the result of the arbitration could have a significant effect upon those unions constituted a denial of natural justice." [Emphasis added.]

[78] In *C.U.P.E.*, competing unions were in disagreement about entitlement to be assigned staging and lighting work by the CBC. In the past, staging work had gone to one union and lighting work to another, both of which had a collective agreement with the CBC. A third union also had a collective agreement with the CBC and initiated a series of grievances regarding the assignment of this work, the result of which were two arbitral decisions designating the third union as entitled to the work. The first and second union had not been notified of the grievances and only became aware of the awards when CBC began assigning the work to the third union.

[79] The first and second unions sought judicial review to have the awards set aside but the Divisional Court denied the application. The Court of Appeal reversed the Divisional Court decision in a judgment by Carthy J.A., who adopted a "common sense" approach drawing on principles of fairness and pragmatism:

> 5 My thinking starts with a practical, common sense compulsion to put all these parties in one room, before one tribunal, to obtain one ruling on their differences. Upon analysis I find that legal precedent supports this view.
>
> 6 The practical rationale cannot be better put than in the majority decision in *Toronto (Municipality) v. Canadian Union of Public Employees, Local 43* (1989), 5 L.A.C. (4th) 404 (Ont.). The grievance was by Local 43 of C.U.P.E. complaining that work to which they were entitled was being assigned to Local 79 of C.U.P.E. Local 79 wanted status before the arbitration board and Local 43 objected. In their reasons, the majority said at pp. 410 and 411:
>
> > The cases offer very little guidance on the consequence of a party being given status. It was pointed out in argument before us, that it would be unfair for Local 79 to have status in these proceedings and, if Local 43 were to succeed, process a similar grievance under their collective agreement.
> >
> > The purpose of arbitration is to provide an expeditious settlement of disputes between employers and unions concerning the interpretation of their various agreements. It is a private system that the parties commit themselves to (albeit through legislative direction). It is intended to be practical, accessible and remedial.
> >
> > Here we have one employer and two unions, each of which is bound to such a system of dispute settlement with that common employer. It is academically correct, but totally impractical, to say that in disputes such as the one before us, the board should deny status to the other union. ...
>
> 9 Continuing with a common sense analysis, we have a two-party dispute in which the employer has limited interest and a third party's agreement has been interpreted, leading to an award that effectively directs the transfer of work assignments while the individuals who suffer are left to pursue grievances under

> their own collective agreements in hope of receiving a conflicting decision. ... [T]here is no clear legislative path to resolution of these overlapping disputes though practicality in day-to-day labour relations demands that there be one. In fact, we were referred to a number of arbitration awards adopting some form of involvement by non-parties to an agreement in similar situations, indicating that, whatever the legal obligation, this is the usual practice. [Emphasis added.]

[80] The following additional comments made by Carthy J.A. in *C.U.P.E.* regarding the question of fairness and where the line may be drawn between a private agreement and contested proceedings are also instructive:

> 15 The logic apparently lying behind the Divisional Court's reasoning [to deny the judicial review] is that collective agreements are private contracts and the resolution of rights within them is exclusively reserved to the parties. That would be so in negotiations to change the terms of an agreement but this exclusivity falls aside when arbitration is pursued.
>
> 16 It is then an adjudicative proceeding in an administrative framework. When C.U.P.E. brought this issue to the Divisional Court, N.A.B.E.T. was made an intervenor by a consent order. If contested, its motion would undoubtedly have been allowed. No one would have tested its legal rights in any strict sense. The practical impact of the result of this proceeding is so direct that fairness dictates N.A.B.E.T.'s involvement. The same test would have been appropriate at the arbitration level. Arbitrators are working within a statutory framework to assure that employers and employees treat one another fairly within the context of their agreements, that disputes are efficiently resolved and that labour relations do not break down through the alternative of protracted court proceedings. Their awards can become judgments of the Federal Court when filed pursuant to s. 66 of the Canada Labour Code. They must be fair and should not be restricted to hearing only persons with a strict legal interest.
>
> 17 In my view it was unfair and constituted a failure of natural justice to deal with the employment opportunities of the C.U.P.E. and N.A.B.E.T. union members, in the circumstances of this case, in the absence of notice and an opportunity to seek involvement in the decision-making process. [Emphasis added.]

[81] The respondents in that case submitted to the Court of Appeal that cases such as *Hoogendoorn* and *Bradley* could be distinguished because in those cases the employees' interests were finally determined, rather than simply affected. The Court of Appeal rejected this argument at para. 11, finding,

> It is true that the employees' legal rights were directly affected, but there is nothing in the reasons to limit the entitlement to that circumstance. The language of Laskin J.A. [in *Bradley*] at p. 317 O.R. is very broad:
>
> > ... The common law has been specially sensitive to deprivation of property or contractual advantages in proceedings of an adjudicative character without previous notice thereof to persons likely to be directly affected, unless there is clear statutory exclusion of such notice. [Emphasis added.]

[82] As in *Hoogendoorn*, the Court of Appeal in *C.U.P.E.* was of the view that "the union members in the present case should have been entitled to notice and the opportunity to prevent loss of employment without the necessity of further proceedings" (para. 12).

[83] Although CUPE is distinguishable on its facts, we are of the view that the Court of Appeal's comments on procedural fairness in arbitrations are also applicable in the particular facts of this case, where the Board has approved a settlement that could impact another union, which outcome could not have been achieved through the adversarial resolution of the root applications, and where the proceeding in fact became adversarial when CAW objected.

[84] The Divisional Court considered the issue of whether a lack of notice to a third party union was a ground for overturning an arbitral decision on judicial review in *Teamsters International Union, Local 847 v. Directors Guild of Canada, Ontario District Council*, [2003] O.J. No. 5097. Although Meehan J. dismissed the application for judicial review brought by the union seeking notice, and the facts of the case are also distinguishable from those before us at present, the principles confirmed in *Teamsters* are useful in assessing the issue before us.

[85] Meehan J. adopted the Supreme Court jurisprudence, stating at para. 8, "The Supreme Court of Canada has held a party is entitled to notice is one who is significantly affected or directly and necessarily affected by the decision. See *C.U.P.E. v. C.B.C.*, [1990] O.J. No. 772; affirmed S.C.C. 1992 CanLII 108 (SCC), [1992] 2 S.C.R. 7 at p. 9, and *Telecom. Workers Union v. Canada (C.R.T.C.)*, 1995 CanLII 102 (SCC), [1995] 2 S.C.R. 781, at p. 797, para. 32." [Emphasis added.] He then noted at para. 10, "It appears in the cases cited in its favour by the applicant, the party entitled to notice was either bound by the collective agreement or there was a common employer or further a trade union interested in an issue which might effect them in another labour arbitration proceeding with the same employer."

[86] In *Teamsters*, the applicant had not applied to obtain bargaining rights for the groups involved, it did not have legal or representational rights to the work at issue, and it had already initiated parallel proceedings relating to the dispute before the OLRB, which would be open to judicial scrutiny in any event at their completion. However, it appears in this case that several of the factors enunciated at para. 10 are present – CAW was bound by a collective agreement with the Employers, there was a common employer between CAW and UFCW, and CAW was interested in the Related Employer Application as it may well affect it in another labour arbitration with the same employer.

[87] Other arbitration cases, while not contemplating precisely the same facts, demonstrate some of the circumstances when third party unions have been found to have an interest in an arbitral outcome that entitles them to notice. For example, in *Grey Bruce Health Services v. Ontario Public Services Employees Union, Local 260* (2004), 131 L.A.C. (4th) 193, the Ontario Nurses' Association was granted intervenor status in an arbitration launched by another union relating to the employer's decision to lay off a number of registered practical nurses and replace them with registered nurses (RNs), who would be represented by ONA. Although no RNs had yet been hired, and thus none of ONA's members would be directly affected by the outcome, the arbitrator granted the ONA standing because "To deny ONA status on the grounds that a decision upholding the grievances by itself will not directly result in ONA's rights being adversely affected, is to ignore reality… the impact of success of the OPSEU grievances is real, not merely speculative" (para. 6).

CAW is an interested party entitled to notice and to participate

[88] We are of the view that the principles outlined in *C.U.P.E.*, *Hoogendoorn*, *Bradley*, and the other cases cited above are applicable in the circumstances of this case. The applications for a Related Employer declaration are public and contested. The intervening settlement arising from the applications does not transform the matter into a private agreement with more limited rights to intervene.

[89] The settlement affected the rights of third parties and is enforceable as a Board order. The Board recognized the right of the Beaverwood Store employees to notice and participation given their timely objection, but curiously failed to recognize the right of CAW to receive notice and to participate in the proceeding.

[90] We conclude that it was not a prerequisite that CAW actually represent Rexall employees to have a sufficient interest to be entitled to notice. There can be no doubt that CAW is significantly affected or directly and necessarily affected by the April 7, 2008 Decision granting UFWC rights to represent all Rexall employees in the Ottawa region.

[91] The likely effect of the April 7, 2009 Decision for CAW is two-fold – first, it limits the union's future representation rights, and second, it potentially undermines existing vested relationships.

[92] The repercussions of the UFCW-Employer agreement are to bump CAW from representing in the future Rexall employees in stores opened in the Ottawa region, and to benefit UFCW by enabling it to expand in the Ottawa/Carleton region, which was previously exclusive CAW terrain.

[93] As well, CAW expresses concern that the Employers may close Pharma Plus stores only to subsequently open a Rexall store as the Rexall collective agreement negotiated with UFCW is less beneficial to employees than the collective agreement that CAW has negotiated with the Employers for Pharma Plus employees. Obviously such a tactic benefits the Employers, but not the employees that CAW presently represents.

[94] The CAW concern is not imaginary, or speculative. This concern has crystallized in two instances in Ottawa with respect to closure of two Pharma Plus stores since these proceedings began in 2009. In one instance, the Pharma Plus store was closed on one side of a mall and a Rexall store was opened on the other side of the same mall. In another instance, the Pharma Plus store was closed and a Rexall store opened a short distance away.

[95] We conclude that the requirement of the Board that CAW actually represent Rexall employees to be entitled to notice is unreasonable and does not accord with the case law, or principles of natural justice and basic fairness.

[96] Once the Board contemplated expanding the Related Employer Applications to include the Ottawa region, CAW was entitled to notice. CAW became an interested party entitled to notice as its contractual advantages were likely to be directly affected by an adjudicative proceeding (using the language in *Bradley* and relied upon in *C.U.P.E.* (C.A.) at para. 11), or as an entity that the result of the arbitration could have a significant effect upon (in the language of the Supreme Court in *C.U.P.E.*). We conclude that the practical impact of the April 7, 2009

Decision upon CAW, and basic principles of fairness, mandate CAW's involvement as intervenor in the Related Employer Applications.

The agreement between CAW and the Employers is sufficient to meet the test of a direct interest

[97] Alternatively, if we are incorrect in the conclusions reached above, we are of the view that the agreement negotiated with the employer in October 2008 during the negotiations for the renewed collective agreement in the "Letter of Understanding" established between CAW and the Employers on October 24, 2008, referred to in para. 33 above, provides CAW with a sufficiently direct interest to be entitled to notice of the Related Employer Applications once the Ottawa region was in play.

[98] In the written submissions provided to the Board on September 25, 2009, the Employers assert that "In light of the Boards order, dater April 7, 2009, the foregoing letter is now exhausted and void; the UFCW was awarded representation rights with respect to that store [on Beaverwood Road]." This assertion by the Employers itself suggests that, prior to the April 7, 2009 Decision, CAW did have an acknowledged direct interest in relation to a store that was the subject of the Board's order.

Conclusions

[99] Answering the questions posed above, we conclude, in the particular circumstances of this case, that:

- CAW was entitled to notice of and to participate in the Related Employer Application and to make submissions before the Board on April 7, 2009 about whether the Regional Municipality of Ottawa/Carlton should be part of the declaration made in favour of UFCW. The decision of the Board denying CAW the right to notice and to participate was a breach of the principles of natural justice;

- the conclusion of the Board that CAW must have a direct existing interest by representing Rexall employees to be entitled to notification and the right to participate in the Related Employer Application was unreasonable as the decision is not fair, is contrary to the principles of natural justice, and is not supported by the case law; and,

- if there was a requirement to prove an existing direct interest, given the failed attempts at certification and the Letter of Understanding between the Employers and CAW concerning the Beaverwood Road store, we conclude that CAW did have a sufficient direct interest in the matter before the Board to be entitled to notice and to participate in the Related Employer Application, once the Ottawa region was in play. We conclude that the conclusion of the Board that the CAW did not have a direct interest was unreasonable and not supported by the facts.

[100] We conclude that the reconsideration decision of the Board dated October 29, 2009 does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law as described in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), at para 47.

Fashioning the appropriate remedy

[101] In fashioning the appropriate remedy, our goal is to correct the fault of a lack of notice to CAW and denial of the right to participate in any decision affecting future rights to represent employees in the Regional Municipality of Ottawa/Carlton. It is our responsibility to put each of the parties in the same position prior to the point that the error occurred.

[102] We are aware that this decision may have an impact upon the settlement reached between UFCW and the Employers. In the circumstances, the parties assumed that risk.

[103] We are more concerned about the rights and stability of existing employees of Rexall stores in the Ottawa region. The newly constituted Board will have to determine the appropriate remedy for the existing Rexall stores in Ottawa and employees presently represented by UFCW, as well as the rights of future Rexall employees in any new stores that may be opened in the Regional Municipality of Ottawa.

[104] The application for judicial review is granted. The April 7, 2008 Decision is quashed, and the incorporation of the settlement between UFCW and the Employers into an order of the Board is of no force and effect. The related employer applications brought by UFCW for Hamilton and Peterborough are remitted to a different member or members of the OLRB.

The parties agreed that the successful party should be entitled to costs fixed in the amount of $4000.00. The respondent Employers and UFCW shall be equally responsible for paying these costs to CAW.

3033-09-U (Court File No. 451/11) Vale Inco Limited -and- United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Locals 6500 and 6200 and OLRB

Judicial Review – Procedural Fairness – Vale asked the court to quash the Board's ongoing proceeding as, after hearing some evidence adduced through oral examination and cross examination, the Board directed the parties to file will say statements, and allowed them to expand on the will say statements with a further thirty minutes of examination in chief with cross examination – On the record the court was unable to conclude that the measures adopted by the Board would result in the prospect of a real unfairness – Application dismissed

Superior Court of Justice (Divisional Court), Pardu, Dambrot and Harvison Young JJ., October 31, 2011

PARDU J. (ORALLY)

[1] Vale Inco Limited asks this Court to quash ongoing proceedings before the Ontario Labour Relations Board on the ground of procedural unfairness.

[2] After hearing some evidence adduced through oral examination and cross examination of witnesses, the Board directed the parties to file will say statements, allowed them to expand on the will say with a further thirty minutes of examination in chief, with cross examination to follow.

[3] The applicant argues that to change the rules of proceeding mid-stream is fundamentally unfair and that the entire proceedings must be vitiated. It argues, that having allowed the Union to present its evidence orally without time limits, it would be unfair not to give the employer the same opportunity.

[4] On this record, we are unable to conclude that the measures adopted by the Board result in unfairness. We do not know the precise factual issues in dispute nor the nature of the evidence affected by the ruling. In *Ontario (Liquor Control Board) v. Lifford Wine Agencies*, (2005) O.J. No. 3042, Cronk J.A. noted at paragraphs 42 and 43:

> 42. Neither the interests of justice nor meaningful judicial review are facilitated by the untimely challenge of administrative action during the course of a pending hearing before an administrative tribunal. Accordingly, as a general rule, such review applications should be avoided until completion of the applicable tribunal's hearing, when a full record will be available to the reviewing court. This is particularly the case where there is an adequate alternative remedy by way of appeal.
>
> 43. This general rule, however, is not absolute and should not be applied rigidly if there is a prospect of real unfairness through, for example, the denial of natural justice. In these circumstances, which will arise infrequently, the courts will intervene before completion of an administrative hearing and prior to the exhaustion of all alternative remedies.

[5] For the reasons stated, we are not able to conclude that there is a prospect of real unfairness. This is not one of those unusual cases where judicial review should be granted in respect of procedural rulings made part way through a hearing.

[6] The application is dismissed.

[7] Costs to the respondent Union fixed at $5,000.00.

CASE LISTINGS AUGUST 2011

(not included in this issue)

CASE LISTINGS SEPTEMBER 2011

(not included in this issue)

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ISSN 0383-4778